

West Oakland Home, Inc. d/b/a Lincoln Child Center and Social Services Union, Local No. 535, Service Employees International Union, AFL-CIO. Case 32-CA-11440

April 28, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On September 19, 1991, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed limited exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, West Oakland Home, Inc. d/b/a Lincoln Child Center, Oakland, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(e) and reletter the subsequent paragraphs.

“(e) Make the Union whole, with interest, for any loss of dues suffered as a result of the Respondent's action in causing employees to withdraw from the Union and in failing to comply with the checkoff provisions of the collective-bargaining agreement.”

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

As noted in the Respondent's exceptions, the judge incorrectly stated that there are 15 group counselors. The correct number of group counselors is 20. This factual correction does not affect the analysis of the unfair labor issues presented.

² In accord with the exceptions of the General Counsel and the Charging Party, we shall modify the recommended Order to include affirmative language requiring the Respondent to reimburse the Charging Party for any loss of automatic dues deductions suffered as a result of the Respondent's unlawful solicitation of unit employees' revocation of dues-checkoff authorizations. Interest on amounts due shall be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT expressly or impliedly coercively inform our noncredentialed teachers A and B that they are no longer in the Union because they are professional employees, while soliciting these employees to terminate their dues-checkoff authorizations.

WE WILL NOT refuse to bargain with Social Services Union, Local No. 535, Service Employees International Union, AFL-CIO as the exclusive representative of all the employees in the following appropriate bargaining unit:

All full-time and regular part time group counselors (including all categories of counselor covered in the previous Agreement), tutors, instructional aides, secretaries, maintenance persons, maintenance assistants, janitors, yardpersons, cooks, assistant cooks, housekeepers, excluding all employees in the tutoring workshop program, all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT unilaterally, and without consultation with the Union, remove unit work, remove the positions of noncredentialed teachers A and B from the bargaining unit after substituting these new positions for the IA activity and IA milieu positions, and unilaterally grant the noncredentialed teachers A and B wage increases.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as exclusive representative of all the employees in the above-described unit with respect to rates of pay, wages, hours, and other terms and conditions of em-

ployment, over the proposed changes in the unit work, changes in the classifications of employees in the unit and changes to unit employees' positions and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, on the Union's request, rescind the change in wages and other terms and conditions of employment instituted on or about August 31, 1990, and reinstate the terms and conditions of employment that existed prior to that date, and make the employees whole for any wages and/or benefits lost to them by this unilateral conduct, with interest.

WE WILL reimburse the Union, with interest, for any loss of dues suffered as a result of our unlawful action in causing employees to withdraw from the Union and in failing to comply with the checkoff provisions of the collective-bargaining agreement.

WEST OAKLAND HOME, INC. D/B/A LINCOLN CHILD CENTER

Jeffrey L. Henze, Esq., for the General Counsel.

Marcia Hoyt, Esq. (Titchell, Maltzman, Mark, Bass, Ohleyer & Mishela), of San Francisco, California, for the Respondent.

Timothy Lee Haxton, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried March 19–22 and 25–27, 1991,¹ at Oakland, California. The charge was filed by the Social Services Union, Local No. 535, Service Employees International Union, AFL–CIO (the Charging Party or Union) on October 4 against Lincoln Child Center, Inc. (Respondent or Lincoln). On November 30, 1990, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing, as amended, alleging Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act.

Respondent's timely filed answer to the complaint, admits certain allegations, denies others, and denies any wrongdoing.

All parties were given full opportunity to appeal and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record, including my observation of the demeanor of the witnesses, and having considered the posthearing briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Based on Respondent's answer to the complaint, I find they meet one of the Board's jurisdictional standards and the Union is a statutory labor organization.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Positions of the Parties*

General Counsel claims Respondent violated Section 8(a)(5) of the Act by eliminating bargaining unit positions at the beginning of the 1990–1991 school year. The positions General Counsel asserts were wrongfully omitted are instructional assistant activity (IA activity) and instructional assistant milieu (IA milieu). Respondent created in place of these two admittedly bargaining unit positions the positions of noncredentialed teacher A and noncredentialed teacher B, and claimed these new positions were professional positions not in the unit, and granted wage increases to the employees holding these new positions. It is uncontroverted that the positions of IA activity and IA milieu were part of the recognized unit. General Counsel alleges Respondent took these actions without prior notice to and the consent of the Union and without affording the Union an opportunity to negotiate and bargain about the changes as the exclusive representative of the employees in the appropriate unit.

Respondent admits the following unit is appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part time counselors (including all categories of counselor covered in the previous Agreement), tutors, instructional aides, secretaries, maintenance persons, maintenance assistants, janitors, yardpersons, cooks, assistant cooks, housekeepers, excluding all employees in the tutoring workshop program, all other employees, guards, and supervisors as defined in the Act.

General Counsel argued in the alternative. His primary position is that both the former instructional assistant positions and the noncredentialed teacher positions mentioned above, are nonprofessional positions within the meaning of Section 2(12) of the Act. Accordingly, Respondent, by removing the noncredentialed teachers from the unit during the term of the collective-bargaining agreement, violated Section 8(a)(5) and (1) of the Act.

Alternatively, General Counsel avers, if the noncredentialed teachers are professional employees, the instructional assistants must also have been professional employees making their midcontract removal from a recognized mixed unit violative of Section 8(a)(5) and (1) of the Act. Another alternative theory advanced by General Counsel is, assuming the noncredentialed teachers were found to be professionals under the Act, and the instructional assistants determined to be nonprofessionals, the removal of work from the unit was effected unilaterally, without bargaining with the Union, in violation of Section 8(a)(5) and (1) of the Act.

¹ All dates are in 1990 unless otherwise indicated.

Further, General Counsel asserts Respondent violated Section 8(a)(1) of the Act, when, on September 19, it informed the noncredentialed teachers: (1) they were professional employees and thus no longer in the Union; (2) solicited these employees to cease paying union dues, and instead donate this money to charity, and impliedly promised the employees who took such action would be promoted to supervisory positions; and (3) solicited the noncredentialed teachers to revoke their dues-checkoff authorizations.

Respondent claims the noncredentialed teachers are professionals within the meaning of the Act and have no community of interest with other members of the unit including group counselors.² Also, Respondent claims the instructional assistants³ were not professionals, were “vastly different” from the noncredentialed teachers, and there was no wall-to-wall or mixed unit.

As an affirmative defense, Respondent claims it was acting within the management-rights clause of the collective-bargaining agreement when it created the noncredentialed teacher positions and therefore had no obligation to bargain with the Union over any of these changes. Further, Respondent asserts by the Union’s failure to request bargaining over these changes and letting the time for implementation pass, it has acquiesced in the changes and waived its right to collective bargaining over these changes. Respondent also denies committing any of the alleged violations of Section 8(a)(1) of the Act.

Respondent contends General Counsel has not borne his burden of proving the violations. General Counsel correctly claims Respondent has the burden of proving inclusion of the noncredentialed teachers in the unit is no longer appropriate and has failed to meet this burden citing *Seven-Up/Canada Dry Bottling Co.*, 281 NLRB 943, 947 (1986). In *Seven-Up/Canada Dry Bottling Co.*, Administrative Law Judge Joel A. Harmatz stated:

Administrative Law Judge Melvin J. Wells observed in that case that “‘accretion’ principals . . . have peripheral rather than direct application. . . .” [*Rice Food Markets*, 255 NLRB 884 (1981)] . . . at 886. In finding that the change was insufficient to warrant the employer’s unilateral exclusion of these employees from the established bargaining unit, Judge Wells cautioned that a “spinoff” of personnel had to be distinguished from cases involving “additions to” an existing unit. He reasoned that in the former, a departure from the traditional, restrictive approach in accretion cases is warranted, stating as follows:

[A] division of an existing facility cannot and should not be viewed in precisely the same manner as the addition of a new facility or facilities. Even in circumstances where a new facility would not be viewed as an accretion, because of factors such as distance

²Group counselors are admitted members of the unit and are the employees responsible for working with the residential children from 2:30 p.m., when school ends, to the beginning of school the next morning. The particular job duties and educational requirements for this position are discussed below.

³Respondent also argues it did not eliminate the positions of IA activity and IA milieu, it merely did not fill these positions for the 1990–1991 school year because of budgetary constraints.

from other facilities, lack of interchange, autonomy in labor relations, and other factors considered relevant to a determination vel non of accretion, it would not necessarily follow that the spunoff portion of an existing facility would no longer be considered part of the overall existing unit.

In practical effect, there is a heavy burden on a party seeking to prove “accretion” to show that the group sought to be added to an existing unit is an “accretion” within the meaning of the Board’s longstanding use of that term. . . . When, as here, an employer attempts to justify removing a particular group or groups from the coverage of a collective-bargaining agreement or relationship, it has the burden of showing that the group is sufficiently dissimilar from the remainder of the unit so as to warrant that removal. [255 NLRB at 887] [Citing *Westinghouse Electric Corp.*, 79 NLRB 744 (1948)].

Later, in *Bay Shipbuilding Corp.*, 263 NLRB 1133, 1139 (1982), the identical burden was imposed on an employer, ultimately deemed guilty of an unlawful refusal to bargain where it altered an existing department, transferred bargaining unit employees to it, but then treated the operation as nonunion. In enforcing the 8(a)(5) remedy, the Seventh Circuit Court of Appeals stated:

[I]f the bargaining unit is appropriate, the Act requires an employer to recognize and bargain with the union as the exclusive representative of all employees in the unit. . . . This obligation does not expire automatically when technological innovations affect the jobs of some of the employees in the unit. Rather the employer’s obligations depend on whether the changes in job structure are so significant that the existing bargaining unit, including the affected employees, is no longer appropriate. [*NLRB v. Bay Shipbuilding Corp.*, 721 F.2d 187, 190 (7th Cir. 1983).]

I find Respondent has the burden of proving the professional status of the noncredentialed teacher positions involved in this proceeding, and their differences from IA activity, IA milieu, and group counselor positions, which are admittedly appropriately included in the unit; including why these later three positions are not professionals.

B. Background

The parties stipulated:

Lincoln Child Center provides residential services, day services, and school services for children and their families who are determined to be severely emotionally disturbed and placed at Lincoln Child Center, Inc., by juvenile court systems and Alameda County Mental Health or by various school districts.

It is admitted Mary Ann McKale is the Respondent’s president/executive director, Carol Kern is operations manager, Jackie Houser is day services director, Clarence Johnson, supervisor of the residential program on campus, Cheryl

Wilson the assistant program director for the school, and Baba Shabbas, director of residential services.⁴

Respondent's license permits them to serve children from as young as age 5 to as old as age 18 in a variety of settings.

Prior to 1987, Respondent assisted in the provision of housing what was designated an agency school on the site, teachers were provided by Oakland Unified School District and Respondent provided the facilities, material and activity aids. Prior to the 1987–1988 school year, Respondent had group counselors assigned to work with the agency school specifically to run activity programs. These group counselors were members of the bargaining unit. The Union has been recognized by Respondent since 1977, after elections held that year. Negotiations were protracted and resulted in a collective-bargaining agreement in 1979. Successive collective-bargaining agreements were negotiated with the current contract effective by its terms from July 1, 1989, to June 30, 1992.

1. Operations in 1987–1988

In 1987, Respondent opened a nonpublic school (NPS) at its facility, which was a four-classroom elementary school serving between 32–34 children in grades 1 through 6. The children were between the ages of 5 and 11. Lincoln hired its own credentialed classroom teachers (teacher C). To supplement the basic elementary curriculum, Respondent also offered what it referred to as enrichment programs. In 1987 these enrichment programs included physical education and arts and crafts. The title of the individuals handling the enrichment programs was changed from group counselor to IA activity in 1987 because, according to Jackie Houser:

[B]efore we had the nonpublic school, when we were an agency school, Lincoln Child Center had group counselors assigned to work with the agency school, to run activity program then. . . .

Q. So, the group counselors in the agency school, the job duties evolved to the point that the employer changed the job title to instructional assistants. And they were working, at that point, then, in the nonpublic school?

A. Well, it's not that the duties had evolved at that point. The duties didn't change. It's just that, when we became a nonpublic school, our funding source changed. And you had to create terminology that's acceptable to that funding source.⁵

⁴Baba Shabbas did not appear and testify concerning the duties and performance of the group counselors. His absence was unexplained.

⁵Respondent notes the funds for operating the facility come from different sources. To attend Lincoln, each child must have an individual education program (IEP), describing the child's particular needs which Respondent must meet. The IEP must be agreed to by the school district involved, the child's parents or guardian and, if needed, the county social services agency. Lincoln has children from different school districts. The IEP could include services such as speech therapy, vocational rehabilitation, or the need for a one-on-one aid, which the contracting school negotiates to be paid for by that school district. The residential program is based on a State schedule through the State's Department of Social Services, under a point system which includes the education and training of the sociology or psychology professionals serving the children. Also consid-

The name change for these employees providing the enrichment activities was IA activity. Also during this time, Respondent created a facility called "backup" which was staffed by one employee in the new position titled IA milieu.⁶ Houser explained the nonresidential milieu as follows:

And I believe it was the first year we were able to add an instructional assistant to the milieu, which, in Lincoln's terminology, is the part of the day that isn't spent in an actual classroom. And it includes the morning program, the transition program, the lunch recess program, and all of our crisis backup programs.

These new positions were included in the unit and there is no claim the Union and Respondent bargained about the creation of the new positions or the Union requested bargaining. Respondent had four IA activity and one IA milieu during this school year.

The children would come to the enrichment program in subgroups of five from the academic classroom on a scheduled basis. The IA activity, under the supervision of an assistant director, ran the enrichment program. The type of activities the children engaged in depended on the activity. Initially, in arts and crafts the children worked from craft kits or made holiday-related projects such as candles around Christmas. According to Houser, the PE activity program would afford the children "an opportunity to play outside, supervised play." The IA activity employees were never under the supervision of the classroom teachers. As previously noted, these duties did not change from those performed by the group counselors for the agency school and Respondent admitted these changes were motivated by funding requirements rather than significant changes in duties.

ered are the prior years' costs and the State budget which may or may not include an increase in the cost of living. Once the rate is set, the funding is accomplished through the various counties Aid to Families with Dependent Children (AFDC). According to McKale's uncontradicted testimony, the AFDC funds may not pay for any of the educational services provided to the children by the nonpublic school (NPS).

⁶There were no new employees hired to fill these positions, former group counselors were continuing their activities under new job titles. Backup was described by Houser:

When a child had a significant problem in any other part of the school program, whether it be the academic classroom or in the arts and crafts or outside with the PE activity counselor or instructional assistant, and did not respond to the authority, direction, instruction, you know, control of that person, they could be sent to what we call backup. And the instructional assistant milieu would be there to try and manage that child's behavior and assign some kind of a consequence from the list of appropriate consequences that we had available and assist that child in returning to a program.

Silva-Broussard described Backup:

Mike Pellegrini would tell me that the—that backup was a necessary part of the program in that its purpose was to allow kids to—a cooling-out period in order to get them back into the program.

That child might need—might have some problems at home and not be able to function within the classroom, and because that child couldn't function within the classroom and having emotional disturbances would sometimes cause the class to go haywire.

So that child was pulled out of the class in order to salvage the lesson that the teacher was working on at the moment.

According to Respondent, the job duties of an IA milieu during the 1987–1988 school year was, if any children were in personal crises and could not remain in their current activity for they did not respond to authority, direction, and/or instruction, either in a required classroom or enrichment program, they would be brought to “backup,” to be taken care of by the IA milieu. The IA milieu would then be responsible for managing the child’s behavior, which could include assigning some kind of a consequence⁷ from the list of appropriate consequences. There was no such list placed in evidence.

2. Operations during the 1988–1989 and 1989–1990 school years

The NPS operated by Respondent did not change in size or basic services during the 1988–1989 school year, but the job descriptions for new hires in the IA milieu and IA activity positions were changed to require them to have at least a bachelor’s degree. Also, the activities the employees conducted were to contain some instruction. As Houser stated in her affidavit “That is, for example, an IA doing PE didn’t just play games with the children, but now had to plan a lesson and class, et cetera, and teach it.” Respondent never questioned the appropriateness of including the IA activity and IA milieu position in the unit, despite these changes.

In the 1989–1990 school year, Respondent added a Kindergarten classroom for they were receiving more referrals in the 5-year-old age group. The school was serving about 40 to 45 children and employed about 5 teacher C’s, 5 IA’s activity, and 2 or 3 IA’s milieu. Respondent also modified other classes, to assign children to classes on the basis of the profoundness of their learning handicap. The arts program was also modified to introduce more fine arts and diminish the amount of crafts. There was little if any reliance on craft kits for their staff was more talented, skilled and trained in education.

The physical education staff was encouraged to help the students to “adapt their abilities to skills that will be development appropriate.” The change in classrooms also permitted the physical education program to teach the children skills for they were assigned classes that were more homogeneous by age and skills and grade level; so the IA activity was expected to give more instruction. Additional equipment was acquired this year more suited to particular age groups, such as a nerf ball which could be used with a smaller lower basket rather than a full-size basketball, which also permitted more instruction.⁸ Also added to the activities program was a computer lab conducted by an IA activity.

⁷The term consequence is defined in detail later, but in general it was defined as more a punishment rather than psychoanalytical or therapeutic treatment.

⁸Houser, who was responsible for the operation of the NPS and assignment of job duties to the IA’s testified:

Certainly we were encouraging the staff, through my assistant director, to look at their program more from an instructive point of view, in terms of the activities they chose and the levels in which they introduced those activities, taking into account that, during the course of the day, the levels of the children would be very different.

Again, these changes in job duties were not claimed by Respondent to warrant removal of the IA activity and IA milieu positions

The IA’s milieu and IA’s activity were required to make daily notes this year in addition to prepsychiatric staffing notes and incident reports. This duty was in the job description but was not previously implemented according to Houser. The daily notes were a short recapitulation of an event which was passed on to those responsible for the child’s care later that day. For example, if the child had a fight with a child in a different unit, the group counselor responsible for their care after school would be informed of the problem and be prepared for possible repeat “interaction.”

The testimony of Houser on how many IA’s wrote these reports is unclear. I note Houser tended to be unresponsive to questions and rather than responding candidly attempted to tailor her replies to fit Respondent’s litigation theories. For example, rather than stating she did not know or was unsure how many IA’s milieu regularly prepared daily notes, she went into a recitation of the different skills possessed by the respective IA’s milieu, and how only one had confidence in his writing skills. There was no foundation for this volunteered information, and she left unclear whether Respondent required all IA’s milieu and activity to submit daily notes as appropriate. She testified initially both IA’s milieu and activity were to write the daily notes. I find this tailoring of testimony and volunteering information, and the attendant clouding of facts, seriously detracts from Houser’s credibility. Further, she did not appear to be attempting to be candid and reply to questions in a forthright manner; particularly when they were asked by counsel for General Counsel and/or counsel for Charging Party. Accordingly, I will credit her testimony only where it is credibly corroborated.

3. Changes implemented in the 1990–1991 school year

In the continuing evolution to the NPS, Respondent made several changes. In February 1990, Houser proposed adding a middle school program to Lincoln. In this proposal, Houser planned to modify the positions of IA activity and IA milieu to noncredentialed teachers A and B, respectively.⁹ The middle school was an intensive residential treatment (IRT) program.¹⁰ This was the fourth program at the facility and the

from the unit and Lincoln never proposed such action to the Union or otherwise.

⁹As another example of Houser’s volunteering information and reticence in candidly responding to questions, when inquiry was made concerning this plan, she testified:

Q. Okay. And, as part of this proposal, did you propose to elevate the positions of instructional assistant activity and milieu to the positions of noncredentialed teachers A and B?

A. I think, you know, that proposal makes clear that it was a major change in the school population, by taking in the IRT children and starting a middle school.

Q. Let me ask the question again. Did you propose to elevate the positions of instructional assistant activity and milieu to the positions of noncredentialed teachers A and B, as part of your proposal?

A. That was one of the many changes that grew from taking on the new population.

ADMINISTRATIVE LAW JUDGE: Just answer the question.

THE WITNESS: Yes.

Q. And, as part of this proposal, you also proposed that the new positions of noncredentialed teachers-A and -B would be nonunion positions; is that correct?

A. That’s correct.

¹⁰Houser described the program as serving:

1990 school year was the first year these students were served by Respondent. This addition also added to the number of very seriously disturbed children treated at Lincoln.

The other treatment programs at Lincoln are the day treatment program, the residential treatment campus-based program,¹¹ and the residential treatment community-based program.¹² Each program serves a distinctly different population of children. The children aren't in two treatment programs at the same time. There are also three or four children who participate in the residential programs at Lincoln but do not attend the NPS, they attend public schools. To accommodate

adolescents age approximately 12—11 or 12 to 14, from San Francisco County, who have been repeatedly hospitalized for psychotic behavior. And they're almost exclusively managed on psychotropic medication. They all—all of the children, they also have the contributing levels of learning disabilities, histories of abuse, some peripheral interactions with the law enforcement community. And there can be lots of other pieces to their puzzle. But the common denominator for the IRT, the intensive residential treatment child, is the repeated psychiatric hospitalizations. Many of them have been in Napa.

They are maintained on a separate house that happens to be adjacent to the Lincoln campus.

¹¹ According to Houser:

In the residential treatment campus-based program; those are latency age children, approximately ages six through 12. . . .

THE WITNESS: Their sexual development, at that point, is latent. So, it connotes an elementary age child. . . .

THE WITNESS: Preadolescent. Before cars and girls, for the boys anyway. . . .

They are so disturbed that it has been determined, by an outside party, such as department of social services or the courts or the county mental health, that they must be removed from their home.

It is usually related to the level of dysfunction in the home, so that the child is emotionally disturbed because of the situation that they've grown up in. And the family continues to be dysfunctional. And the child poses such a danger to themselves or to the community that they must be removed and placed in residential treatment.

¹² Houser described this program as follows:

In the day treatment program are children, as of '90-'91, ages five to 11 and a half at time of intake. They can stay with us up, pretty much, to age 13. They are children who live in the community. They either live in a family home [that is owned and operated by Lincoln], in an extended family home. I say that because many of them are foster-like children who've been placed with a grandparent, usually, or other distant relative, or in a foster home in the community.

They are diagnosed on their IEP as SED, which is seriously emotionally disturbed.

Prior to this year, we would have said that the range of disturbance was mostly either from the depression to the aggressive acting out area of the continuum of normal intelligence, you know, normal cognitive potential, at any rate, with learning disabilities as a contributing disability in about 30 percent of their cases. As of this year, we have a significant number of those children who have drug-exposed damage. So, they have a medical or an organic component in addition to their other disabilities. . . .

The residential treatment community-based, I believe, has children from age nine to 14, 15, maybe, nine to 15. So, they're the slightly older child who either is able to manage or seems clinically more suited to a more family-like environment than the campus-based institution can offer.

these changes, some remodeling and relocation of facilities occurred at Respondent.

As Respondent notes on brief:

The reorganization and expansion of the School brought about more than just changes in to the physical plant. The administration was reorganized and the position of I-A activity was replaced by the Teacher A whose responsibility was to teach enrichment classes; and the I-A milieu position was replaced¹³ by the Teacher B position whose responsibility it was to teach coping or "Life Skills."

These new positions were posted and the former IA's milieu and activity were interviewed and hired as noncredentialed teachers.¹⁴ The interviews were described as cursory and the applicants from the IA positions were not required to acquire additional educational or other special skills. There is no evidence any IA activity or milieu who interviewed for a noncredentialed teacher A or B positions did not qualify for the job. Ralph Silva-Broussard described his interview as follows:

To the best of my recollection, it was a very short meeting and what was said was that basically we'd been doing the job for quite a while and that the positions that were renewed or the new job description just defined the job that we had been doing, along with a few other things that were added.

For example, the "participate in parent/guardian conferences and maintain quality communication with student's home consistent with treatment programs, guidelines" on the second page, that wasn't in the old job description, but I have had meetings with parents where we had to discuss some of the behaviors that one particular child was going through.

A former IA activity who became a noncredentialed teacher A, Vincent Goldman, testified he did not fill out a new application for the 1990–1991 school year. Goldman taught physical education. Respondent admits the IA activity and IA milieu employees applying for the new noncredentialed teacher positions, did not have to submit new employment applications, but were required to have an interview. There is no testimony concerning Respondent's practice and procedure in hiring current employees for new positions. Respondent's failure to provide this information, which clearly only Lincoln possessed, supports my conclusion Respondent has failed to show the noncredentialed teachers have qualifications sufficiently dissimilar compared to the other unit mem-

¹³ Based on this admission, and all the evidence of record, I find Respondent replaced the IA activity and IA milieu positions with the noncredentialed teacher A and B positions, contrary to Houser's and McKale's claims the IA positions were just not filled due to budgetary constraints.

¹⁴ Silva-Broussard, Margo Stills, Vincent Goldman, and Joe Ferrie were IA's activity who were hired as noncredentialed teachers A, O. Harrell was an IA milieu who was hired as a noncredentialed teacher B, and Glen Cardisco, a group counselor, and another individual identified as Paul from IRT, were hired as noncredentialed teachers B.

bers to support their removal from the unit, unilaterally or otherwise. *Rice Food Markets*, 255 NLRB 884 (1981).

4. Respondent's contacts and discussions with the Union concerning the changes in positions

In June or July, Respondent finalized its plans for implementing the new noncredentialed teacher positions. On July 31, Respondent initially informed the Union the IA milieu and activity positions were being eliminated and replaced by noncredentialed teacher positions which "will be outside of the bargaining unit." Respondent's choice of language buttresses my finding the noncredentialed teachers replaced the IA activity and IA milieu positions.

At the end of this letter, the Union's representative, Mary Deems, was invited to discuss the changes with Respondent's attorney, Marcia Hoyt. Also on July 31, 1990, the noncredentialed teacher jobs were posted at Respondent's facility and McKale notified employee Wayne Mayeux of the changes, as a courtesy. Mayeux, chapter president for the Union, understood Respondent was considering making the changes, not that the changes were a fait accompli. Mayeux, a group counselor, asked McKale to notify Deems. Mayeux testified as chapter president he could not do anything, it had to be handled by Deems. He could not recall if McKale gave him any of the new position descriptions. Mayeux mentioned the McKale conversation to Deems the next time he saw her but does not recall when that meeting occurred.

Deems received Respondent's letter on about August 2, 1990. After talking with Mayeux, she requested he get copies of the noncredentialed teacher job descriptions.¹⁵ On August 14, the date Mayeux related the request to Respondent, the descriptions of noncredentialed teacher A and IA activity were faxed to Deems. There may have been miscommunications by either Deems, Mayeux, or a representative of Respondent that led to the failure to provide the job description for noncredentialed teacher B. There is no evidence the Union possessed the details of Respondent's actions or appreciated the nature and quality of these changes upon the unit and the employees it represents.

The Union and Respondent had a meeting scheduled for August 22 to consider a matter unrelated to the issues here under consideration. Near the end of this meeting, Deems

¹⁵ Deems claims about 1 week after receiving the letter, she talked to Hoyt on the telephone about several matters, and one of the items they discussed was Respondent's proposed position changes. Hoyt denies this conversation occurred. Deems related the conversation as follows:

I asked Miss Hoyt what the significance of her letter was; what changes had been implemented in the school program and what the impact was on our bargaining unit members. Ms. Hoyt indicated that the instructional assistant positions of—instructional assistant-milieu and -activity had been replaced by new noncredentialed teacher positions that are—were indicated in her letter. I asked her how that represented a change in how the work was being done, and she said that I needed to talk to the employer to get more information with regard to that—details of that.

I think—I'm pretty sure I also expressed some concern about whether there were going to be any layoffs of any of the people that we represented, since they had said in the letter on the 31st that they were eliminating those bargaining unit positions, and Miss Hoyt assured me that they did not anticipate laying off any bargaining unit members as a result of this change.

asked Respondent for "information from the employer as to what had gone on, what kind of changes they had implemented in the school program with regard to the instructional assistants."

McKale replied the positions of IA milieu and IA activity had been eliminated and they had been replaced by the positions of noncredentialed teacher A and noncredentialed teacher B. McKale further said no employees had been laid off and named each IA and their new position. One of the IA's had quit. Deems was assured that no one had been laid off. Deems then requested the job description for noncredentialed teacher B, she had not previously heard of the position. Deems also informed McKale they needed to hold a meeting to talk about the changes further, after she had seen all of the information. Deems said the Union considered the new positions to be bargaining unit positions and "that we needed to meet and find out what in fact, if any, program changes had happened that might affect our members." Pursuant to an agreement between Respondent and the Union, Respondent informed Hoyt replied the request must be made in writing and Deems requested the job descriptions in writing by letter dated September 4, 1990, which was received by Respondent September 5. Since Deems had another meeting scheduled that afternoon, she was unable to continue the meeting with Respondent, and it was agreed they meet on September 10, 1990.

Also in the September 4 letter, Deems reiterated the Union's position the noncredentialed teacher positions were bargaining unit positions and there would be no change in the duties of those employees previously called IA activity and IA milieu even though Respondent had changed their titles for the new school year. On September 6, Hoyt replied to the September 4 Deems' letter disclaiming Deems said during the August 22 meeting the Union considered the noncredentialed teachers A and B to be included in the bargaining unit and Deems was incorrect in her understanding there would be no changes in duties for those employees previously employed as IA activity or IA milieu. Hoyt claims and Deems denies McKale informed Deems on August 22 there were "substantial changes in job duties and content which were made, among other reasons, to professionalize the positions."

Respondent and the Union agreed to meet September 10, recognizing Houser's presence was also necessary for a meaningful discussion of the changes. Deems stated her concern over meeting after school started; school opened September 4. On September 10, McKale informed Deems Houser was ill and they could not meet that day. Another meeting was scheduled for September 13. During this scheduling conversation, McKale informed Deems Respondent had already ceased deducting dues from those employees who had been IA's activity and milieu and were now called noncredentialed teachers A or B. Deems replied the Union still represented these employees and she "believed it was illegal for the employer to cease deducting union dues before this issue had been resolved."

Deems received a copy of the noncredentialed teacher B job description on or about September 12. Respondent asserts it was not mailed earlier because McKale thought she could give it to Deems at the planned September 10 meeting. Respondent did not explain how it anticipated Deems would be prepared to discuss the matter without prior preparation.

The meeting was rescheduled for September 13,¹⁶ and started 15 minutes late because the union representatives first caucused. According to Deems, during the meeting Houser

said that the school program had evolved and that the positions in that program had evolved—the instructional assistant positions had—as I said, evolved, and that people who occupied those positions over time had taken on some responsibilities voluntarily; that they had certain skills that they had made available to Lincoln and that Lincoln now was expecting more of them than they previously had. . . .

She said that—that instructional assistants were now more responsible for the IEP, which I believe represents individual education plan. . . .

She—also said that the instructional—pardon me, the new teacher noncredentialed A and B would be supervising and evaluating auxiliary instructional assistants—

Deems rejoined the IA activity and milieu job descriptions gave the similar responsibility for the IEP. Further, Deems noted during the 1989 negotiations, Respondent represented to her the position of auxiliary instructional assistant did not exist. Respondent did not clearly and convincingly refute this testimony of Deems. I credit her testimony based on her demeanor, which was open and forthright.

Deems then requested Houser relate the changes in the IA milieu position to warrant claiming the noncredentialed teacher B was no longer in the unit. Houser said

that the difference between the former instructional assistant and the current teacher noncredentialed B was that they were doing more intensive crisis intervention and clinical work; working more closely with the clinical team—I think she mentioned the psychiatrist and the social workers—and that they were teaching a curriculum called “life skills.”

Houser defined life skills as “crisis intervention and teaching coping behaviors to the kids who had problems in school . . . [which] required coordination with the clinical team.” Deems did not discern any differences and asked Houser to explain the differences. Deems could only recall Houser stating the noncredentialed teachers receive more scheduled planning time and they were required to more discretely chart the students’ progress.

Deems next inquired why Respondent thought the noncredentialed teachers should not be included in the bargaining unit. Hoyt responded “the employer considered these people to be professionals and as such it was not appropriate that they be in the same bargaining unit with the other people that the union represented.” Deems rejoined the Union represents professionals, including teachers and social service staff, in other units mixed with nonprofessionals and in wall-to-wall units. Deems then requested salary information. Houser mentioned some noncredentialed teachers were asking what would happen to their wages if they were deemed to be in the unit, and Hoyt said they were informed, according to Deems, “that if the union was returned to being their

representative that the raises that they had received were subject to negotiation and that a lot of factors enter into negotiation.”

On September 18, the Union filed a “step two grievance” concerning the unilateral “change in the Instructional Assistant positions,” declaring the new positions are not in the bargaining unit, and ceasing deduction of union dues for the noncredentialed teachers. The Union requested Respondent to waive the time limits. It is undisputed Respondent set the wage scales for the noncredentialed teachers without notice to or bargaining with the Union.¹⁷ By letter dated September 20, Respondent replied to the grievance stating it was untimely. Respondent has never agreed to waive its timeliness defense. Accordingly, appropriately, there is no request for deferral of this proceeding. The Union then filed the subject unfair labor practice charges.

Based on these findings of fact, I conclude Respondent’s affirmative defense the Union failed to request bargaining over the changes and let the time for implementation pass, thereby acquiescing to the changes is without merit. The Union requested information and a meeting to bargain with Respondent when it was informed of the changes and tried to grieve the matter. The Union did not receive pertinent material concerning the changes in unit until well after the changes were implemented.

C. The Alleged Violations of Section 8(a)(5)

1. Applicable legal principle

As found above General Counsel correctly claims Respondent has the burden of proving the new classifications are not appropriately included in the unit, that they do not share a community of interest in wages, hours, and other terms and conditions of employment.¹⁸ *NLRB v. Action Automotive*, 469 U.S. 490 (1985). Here, there is an attempt to sever the noncredentialed teacher from the recognized unit.¹⁹

¹⁷ The 1990–1991 wage scale for the IA activity and milieu was \$8.56 per hour and \$7.67 per hour, respectively. These employees were paid, as noncredentialed teacher A and B, \$10.15 and \$8.76 per hour, respectively.

¹⁸ Sec. 9(b) provides, as here pertinent:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act, the unit appropriate for the purposes of collective-bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit.

The Board applies Sec. 9(b)(1) “only in situations where a representation election is sought in a unit including professional employees among others.” *Westinghouse Electric Corp.*, 115 NLRB 530, 542 (1956). In the instant case, there is no request for a representation election.

¹⁹ See *Sunrise, Inc.*, 282 NLRB 252 (1986), where a mixed unit election was set aside and a new election or stipulation on scope of the unit was required, because the professionals were not afforded the opportunity to vote whether they wished to be included in the unit. The defect in the mixed unit could not be remedied merely by modifying the unit. In the case here under consideration, Respondent recognized the union as the collective-bargaining representative of the above-described admittedly appropriate unit since 1977, and

Continued

¹⁶ At the meeting, Respondent was represented by McKale, Hoyt, and Houser and the Union was represented by Deems, Wayne Mayeux, and Ralph Silva-Broussard.

In *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962), the elements to be considered in determining community of interest apart from the other employees in the unit include:

[A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs under State and Federal regulation; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining. . . .

A title or classification in common usage does not necessarily establish that separate special interests exist and are preponderant. This can be determined only by making an informed judgement based upon an analysis of the factual circumstances bearing upon the distinguishing factors present in each case.

While the *Kalamazoo* decision involved the severance of truckdrivers from a production unit, the principles established therein have been given broad application. *NLRB v. Campbell Sons' Corp.*, 407 F.2d 969 (4th Cir. 1969).²⁰ As Respondent recognized in its brief, if it is found the IA milieu

there is no issue raised concerning any improprieties in the election in the event IA activity and milieu employees are found to be professional employees.

²⁰The *Campbell* decision quoted the Board's *Kalamazoo* decision extensively, applying its principles, and relied on the following quote in determining the application of Sec. 9 of the Act to the decision-making process as follows:

As we view our obligation under the statute, it is the mandate of Congress that this Board "shall decide in each case . . . the unit appropriate for the purpose of collective-bargaining." In performing this function, the Board must maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability through collective bargaining. In determining the appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective [sic] bargaining must function. Because the scope of the unit is basic to and permeates the whole of the collective bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective-bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered. [136 NLRB at 137.]

Moreover, our determination here . . . rests upon a finding required by the pertinent facts presented that the employees sought do not have such special and distinct interests as would outweigh and override the community of interest shared with other plant employees. In these circumstances . . . [an erroneous decision with respect to the scope of a bargaining unit] would result in creating a fictional mold within which the parties would be required to force their bargaining relationship. Such a determination could only create a state of chaos rather than foster stable collective bargaining, and could hardly be said to "assure to employees the fullest freedom in exercising the rights guaranteed by this Act" as contemplated by Section 9(b). [136 NLRB at 139-140.]

and activity employees and/or group counselors were professionals, the creation of the noncredentialed teacher positions would not create an inappropriate unit and require the removal of the new professional positions from the unit. *Retail Clerks Local 324 (Vincent Drugs)*, 144 NLRB 1247 (1963); *Westinghouse Electric Corp.*, 115 NLRB 530 (1956).

There is a bargaining history of including instructors of art, physical education, life skills, and computer science in the unit. Respondent argues the evolution of the schools created such disparities in these positions to require their removal from the unit.

Therefore, the seminal question is whether Respondent proved the IA's activity and milieu were nonprofessionals while the noncredentialed teacher A and B positions were professionals, and if so, is their separation from the unit required by a lack of community of interest and/or their status as professionals. I note the employees designated noncredentialed teachers have not petitioned to be severed from the unit, Respondent informed them they were not considered by Lincoln to be in the unit for they were considered professionals. Section 12(a) of the Act defines a professional as follows:

[A]ny employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

To determine their status, the various educational and other job requirements of IA activity and milieu, noncredentialed teacher A and B and group counselor must be analyzed. The group counselors are included because they were the predecessor position to the IA activity and IA milieu jobs, which preceded the noncredentialed teachers, Respondent admits they are appropriately included in the unit, thus, their status and job attributes bear on the community-of-interest question.

2. Background

As previously noted, when Respondent was an agency school, the group counselors ran the activity programs and apparently backup. When Lincoln instituted the nonpublic school, the employees performing those jobs had their titles changed to instructional assistants. There were some modifications in their duties but they were still considered part of

the bargaining unit. Houser admitted the name change did not reflect a substantial change in duties rather: "It's just that, when we became a nonpublic school, our funding source changed. And you had to create terminology that's acceptable to that funding source." In the 1988–1989 school year, Respondent rewrote the IA activity and IA milieu job descriptions to require new hires for these positions to possess to have at least a bachelor's degree. There was apparently no question IA activity and IA milieu positions were still part of the unit. Houser reviews and reevaluates all of the job descriptions of the employees in the day treatment program every year. There is no claim any changes to these position descriptions are routinely related to the Union, or the Union had knowledge of these past changes.

One of the principal witnesses on the issue was Houser, who testified at length. Her demeanor was not convincing, she appeared to be defending her decisions rather than helping to develop a complete record without regard to the impact of her testimony on Respondent's position. Based on her demeanor, I find she was not a credible witness. As noted above, she was not responsive at times and tried to tailor her testimony to fit Respondent's litigation theories. Accordingly, I will consider her testimony only when it is unrefuted and when it is credibly corroborated or when it is an admission against interest. Buttrressing this decision is the fact some of her testimony was not based on firsthand knowledge for she was on maternity leave since mid-December 1990. The record does not clearly establish which of her testimony is based on first hand observation or arose directly in course of her duties, and which is based on hearsay and surmise.

I further note there was a quixotic and changeable quality in her testimony. For example, when she was testifying about the creation of the instructional assistant positions she initially claimed the duties evolved warranting a name change and then, upon further questioning, admitted there was no alteration in the job duties, merely a name change to insure receipt of funding, the appellation group counselor was "not an acceptable terminology."

Respondent adduced the expert testimony of George Swartz for their claim the noncredentialed teachers are professionals. I find his testimony unpersuasive. Swartz did not observe the work of IA activity and milieu employees. He had no basis for any comparisons. His observations of the noncredentialed teachers were minimal. He chatted with one noncredentialed teacher A who taught the computer lab, and Annino, like the IA activity instructor before her, was responsible for the development of the curriculum. He also observed the art program and a physical education class. In the art class he observed a noncredentialed teacher A telling a child "Color here. Draw a line here. Do this." In the second art class, the noncredentialed teacher A was just reentering the classroom as Swartz entered so he did not observe or hear any instructions.

Swartz admittedly did not spend much time in his observations, from a few moments, as in the art class, to 10 minutes in the elementary school backup with a noncredentialed teacher B. In backup he observed one child in the room who was "sitting, relaxing." He did not hear the noncredentialed teacher B say anything to that child. In the middle school backup, he spent less than 10 minutes, most of the time talking with one of the adults. He did not identify this individual. There was one child in backup seated with another

adult. He did not spend much time in the room and he did not hear what the adult working with the child was saying. These observations were cursory at best, and were not shown by Respondent to be reliable or meritorious. Accordingly, this testimony is not accorded any weight in reaching my findings of fact and conclusions of law in this decision.²¹

3. Educational and experience requirements

As previously noted, the educational requirement the IA activity and IA milieu instructors possess at least a bachelor's degree was added to their job descriptions for the 1988–1989 school year.²² Respondent, by Houser, also admitted this requirement was not strictly followed, testifying:

we sometimes weigh heavily in the favor of prior experience and waive or substitute many years of relevant experience and other qualifications in training for the degree.

So, in actual practice, I can't tell you absolutely. We've also put heavy emphasis on other things, like a number of years experience at Lincoln, giving someone an opportunity to promote and grow within the agency. Or being able to create a staff that's culturally and ethnically diverse.

So, many things weigh in, not just that one piece of the job description.

The IA activity job description requires:

B.A. or B.S. degree from an accredited college or university in the field of art or physical education or counseling or psychology in some combination. Additional skills considered desirable include music, drama, dance or movement.²³

The job description further requires the following experience:

A minimum of one year experience working with children in field of expertise (art or physical education) and one year experience working with emotionally disturbed children in treatment setting.²⁴

²¹ Counsel for General Counsel seeks reconsideration of my ruling Swartz qualifies as an expert witness. I find this motion is mooted by my conclusion Swartz' testimony is not entitled to any weight based on the admitted lack of sufficient observation and ability to compare the IA activity and milieu positions to those of noncredentialed teachers.

²² Houser testified she was unsure when the change was made to the job descriptions, but was shown her affidavit which clearly stated this educational requirement was added for the 1988–1989 school year. Inasmuch as she admitted she had the appropriate documentation in front of her at the time she gave her affidavit, I find this admission credible.

²³ The noncredentialed teacher A job description has the following educational requirements:

B.A. or B.S. degree from accredited college or university in field of expertise (Art, PE, Computer Instruction, Music or Drama) or psychology, sociology or counseling required. Progress towards M.A. degree desirable. (Teaching Credential, or eligible for a Credential or work towards a Credential). Demonstrated qualifications to teach in field of expertise.

²⁴ The noncredentialed teacher A job description provides:

Continued

The IA milieu job description requires:

EXPERIENCE: A minimum of one year experience working with emotionally disturbed children in a treatment setting.

EDUCATION: Progress towards B.A. degree from an accredited college or university in social work, counseling or psychology. Degree desirable.

The addendum to the IA milieu job description, dated July 1988, permitted Respondent to pay IA's milieu with bachelor's degree higher wages and added job duties.

The job description for noncredentialed teacher B added more requirements. The description provides:

EXPERIENCE: A minimum of two years experience teaching communication, coping, survival and other life skill to seriously emotionally disturbed children. Experience working in a nonpublic school or treatment setting providing crisis and clinical interventions.

EDUCATION: B.A. degree from an accredited college in psychology, sociology, social work or counseling required. Progress towards M.A. degree (MSW or MFCC) desirable. Teaching credential, or eligibility for a credential or work towards a credential preferred. Demonstrating qualifications to teach latency of adolescent children.

While it appears Respondent increased its requirements for experience, I find the record does not support this impression. I also find the changes in the job descriptions do not require or even support a finding noncredentialed teachers are professionals and IA activity teachers were not professionals. Neither of the noncredentialed teacher positions require applicants to possess advanced degrees. The job descriptions were not shown to have been followed. All of the IA activity teachers who were employed at the conclusion of the 1989-1990 school year were hired as noncredentialed teacher A's, yet only one was shown to meet the job description requirements, Silva-Broussard.²⁵ Interestingly, Respondent seems to consider experience as an IA activity qualifying teaching experience.

Further, there is no testimony from the individual or individuals who hired employees for these positions pertaining to the weight they gave the educational requirements of the job descriptions compared to the experience and ethnic requirements. There is no evidence Respondent's representative applied stricter standards or required demonstration of greater professionalism from the noncredentialed teacher job applicants as a prerequisite to hiring compared to prior hiring de-

EXPERIENCE: A minimum of two years experience teaching in field of expertise. Experience working in a nonpublic school treatment setting for emotionally disturbed children.

²⁵ He has a "B.A. from Lincoln State University, Louisiana—Macon State" and a Master's of Fine Arts from the University of Wisconsin at Madison. He possesses the following experience:

I had a grant from Mississippi State—State of Mississippi—to teach in an underdeveloped area in Mississippi, and I held that position for a year. I taught in Philadelphia adult blind people at the Philadelphia Museum of Modern Art. I worked at Berkeley Youth—let me think of the name—Berkeley Academy—for about a year—teaching art to severely emotionally disturbed teenage girls.

cisions involving the IA activity and/or IA milieu positions. Houser could not recall whether she participated in the hiring decision. The responsible assistant program directors who hired IA activity and IA milieu employees in 1988 and 1989 did not appear and testify; their absence was unexplained, warranting an adverse inference. *American Chain Link Fence Co.*, 255 NLRB 692, 693 (1981); *Interstate Circuit v. U.S.*, 306 U.S. 208 (1939). Whether applicants for these positions possessed bachelor's degree or had other qualifying qualities are a matter of records which are in Respondent's possession, and they were not introduced into evidence; also warranting an adverse inference.

Goldman, a noncredentialed teacher A, has a B.S. in sociology from the University of California, at Riverside. He was hired as an IA activity without one of the listed degrees. There is no evidence he had the requisite experience. He did testify he had course work "specific to dealing with children" but there is no evidence he had any experience "working with emotionally disturbed children in treatment [sic] setting." The courses were not listed thus, there is no evidence the course work remotely dealt with emotionally disturbed and/or abused children. When he was hired as a noncredentialed teacher A, he only had 1 year experience "working in a nonpublic school treatment setting for emotionally disturbed children." There was no evidence he possessed special qualifications to work at Respondent in either position which would warrant disregarding the educational or experience requirements. Also, there was no evidence concerning the qualifications of the other IA activity and/or noncredentialed teacher A other than Silva Broussard.

There is no requirement that either noncredentialed teachers A or B be certificated or licensed. Similarly, group counselors, like IA activity and milieu, which are admittedly appropriate members of the unit, are required to possess a B.A. or B.S. degree from an accredited college or university, preferably in the fields of social science or education. The job description for group counselors does permit experience and/or outstanding personal qualifications to substitute for degrees, but there was no evidence this substitution was ever implemented, and if so, on what basis. Therefore, the existence of such a provision in the job description does not differentiate the qualifications of the group counselors from the noncredentialed teachers to permit a finding noncredentialed teachers are required to have more specialized education or training. On the contrary, group counselors were required to have more specialized job experience²⁶ than IA's activity. Also, the only employee other than Silva-Broussard in these categories who has a master's degree, Sharon Scupizio, is a group counselor.

None of the noncredentialed teachers testified they possessed or were pursuing credentials, licenses, or advanced degrees. The employees newly hired as noncredentialed teachers B testified for Respondent, however, they do not appear to meet the qualifications requirements contained in the job description. Andrew Geller has a bachelor's degree in psychology and during his schooling studied with individuals noted in the field of assisting emotionally handicapped children. He was not shown to possess the requisite 2 years, ex-

²⁶ According to Respondent's position description, group counselors needed "two years of specific group experience with children in a psychiatric treatment setting" to qualify for employment.

perience teaching the various skills detailed in the job description.

Another noncredentialed teacher B, Russell Edward Babcock, previously worked for Respondent as a group home counselor. He has a bachelor's degree in developmental psychology and educational development. The record disclosed Babcock worked for Respondent since August 1990, hence he also failed to meet the noncredentialed teacher B experience requirements. The two IA milieu employees who were still employees at the end of the 1989–1990 school year, Orlando Harrell and Mike Pellegrini,²⁷ apparently applied for positions with Respondent as noncredentialed teachers B and were hired. In hiring Harrell and Pellegrini as noncredentialed teachers B, Respondent either again ignored its new experience requirements or considered their work as IA's milieu as qualifying experience, i.e. comparable to "experience teaching communication, coping, survival, and other life skills." It therefore appears Respondent recognized IA milieu work was comparable to noncredentialed teacher B work. In an addendum to the IA milieu job description dated 1988, Respondent provided "Candidate with a BA or BS in a related subject may receive a higher rate of pay." Employees receiving increased wages under this provision were required to perform one or more additional duties.²⁸

Group counselors were also required to possess at least a bachelor's degree by the 1989–1990 school year. I find, consistent with Respondent's admitted practice of routinely modifying job descriptions, Lincoln increased the educational requirements for group counselors to necessitate a bachelor's degree.

Beatriz Reis²⁹ has been a group counselor at Lincoln for about 2-1/2 years and has a bachelor's degree in psychology

specializing in chemical dependency studies. Reis is also pursuing a master's degree in clinical psychology. Thus, a group counselor meets more of the requirements of the noncredentialed teacher B position than at least two of the new employees hired in that position, and the only noncredentialed teachers B called by Respondent. Reis also testified a group counselor named Sharon Scupizio has a master's degree and about four other group counselors are pursuing their master's degrees. There is not one noncredentialed teacher claimed to be pursuing a master's degree. Thus Reis is not a statistical aberration. This testimony also indicated all the group counselors employed by Respondent have been hired with at least bachelor's degree. Wayne Mayeux, who has worked for Respondent since 1987, also has a bachelor's degree in marketing with a minor in psychology. He has 7 years' experience as a probation and parole officer. I conclude the group counselors who testified demonstrated equal or more specialized education and/or training than the noncredentialed teachers who testified.

Also, the job description for instructional assistant classroom, another admitted proper segment of the unit, is required to have an A.A. or B.A. degree from an accredited college in the field of education, child development, or social sciences. Progress towards a teaching credential or B.A. degree is considered desirable. There was no evidence whether and/or how this requirement is followed by Respondent. There was no evidence any of the instructional assistants classroom held only an A.A. degree. Comparable to IA activity, IA classroom was required by Respondent's job description to possess a "minimum of one year experience as an instructional assistant in a special education classroom with elementary or middle school children." An additional year's experience "in a milieu or activity program" is deemed desirable. The actual requirements followed by Respondent in hiring applicants for this position are not a matter of record.

Further, the requirement they possess a bachelor's degree and academic training in employment related subjects has been shown to be more than a paper requirement, not a condition precedent rather than a mere desideratum. However, if such a requirement were found to qualify the position for professional standing, then both IA activity and milieu as well as noncredentialed teacher positions have similar requirements and all would have to be deemed professional employees. *Butler Hospital*, 250 NLRB 1310 (1980); *Community Health Services*, 259 NLRB 362 (1981).

I also find, while Respondent requires noncredentialed teachers A and B to possess bachelor degrees, like IA activity teachers, their duties do not distinguish the noncredentialed teachers as professionals from the IA activity and milieu instructors, who were admittedly appropriate classifications in the unit and claimed by Respondent to be non-professionals, as discussed below. *Chicago School for the*

²⁷ Pellegrini, who only possesses a bachelor's degree, was promoted to supervisor. He is not pursuing an advanced degree and does not possess any credentials or licenses supplementing or enhancing his qualifications nor is he pursuing such credentials.

²⁸ These added duties could include:

Attend field based training programs and present material at agency in—service.

Co-lead time-limited therapy groups relating to milieu goals. Develop and implement recreational or educational package programs including the activities, resource materials, field trips or visits designed to achieve specific milieu goals.

Research and liaison with community resources to achieve specific mainstream or transitional goals for clients provide support for client during transition.

Participate in cross-agency special projects under guidance of program director, i.e., data collection for service analysis, material inventories, task-committees, etc.

²⁹ Respondent argues Reis is not a credible witness. I find she is a credible witness. She appeared candid and forthright. Her testimony on key issues was not refuted by any direct supervisor or witness intimately and directly knowledgeable about the duties of group counselors. Mayeux corroborated her testimony concerning the group counselors' duties. Also, she testified against her current employer, which appeared to make her nervous, particularly on cross-examination. Despite this nervousness, she appeared to be attempting to answer the questions honestly and completely, without dissimulation or device. *Parkview Acres Convalescent Center*, 255 NLRB 1164 (1981). Reis was not only risking her employment, but necessary oversight in meeting the requirements of supervised study, since the study supervisor was also an employee of Respondent.

In an unsuccessful attempt to discredit Reis, Respondent called Steven Herman, a social worker employed by Respondent for about

2-1/2 years. He told the program director, Baba Shabbas he did not want to supervise Reis for he did not think she used good judgment during an "interaction" with one of the children. He did not observe the "interaction." This testimony does not serve to discredit Reis. Shabbas, the program director in overall charge of the group counselors, did not testify. The unexplained failure of this admitted supervisor with the greatest knowledge concerning the actual duties of the group counselors warrants the drawing of an adverse inference. *American Chain Link Fence Co.*, supra, 255 NLRB 692, 693 (1981); *Interstate Circuit v. U.S.*, supra, 306 U.S. 208.

Retarded, 225 NLRB 1207 (1976); *Malcom X Center for Mental Health*, 222 NLRB 944 (1976).

In contrast, teachers C are required to be certified special education teachers or possess an emergency-specialist credential which requires them, after receiving their teaching credential, to pursue through course work, their special-education credential and receive that credential within a specified period of time. Respondent assists the teachers C in obtaining additional degrees and/or certifications. They do not assist or even encourage noncredentialed teachers, IA's activity or IA's milieu, to obtain licenses, credentials or higher degrees.³⁰ The requirement for advanced educational studies and credentials and/or licensure is greater for teachers C compared to the job descriptions for noncredentialed teachers A and B as well as the predecessor IA activity and IA milieu positions. I note the professional status of teachers C has not been established on this record. Not one teacher C testified. This failure was unexplained.

The ostensible professionals employed by Respondent, including social workers and psychiatrists, have markedly greater educational and training requirements than the noncredentialed teachers and IA's activity and milieu. Respondent requires the social workers hired for the day treatment program to have at least a master's degree in a field related to their specialized work, such as psychology or social work. Also, Respondent prefers these employees be licensed clinicians, but they do hire individuals who do not have such a license. The educational requirements for psychiatrists are obviously greater than all the other employees of Respondent, including medical school and residency in psychiatry.

When Silva-Broussard and Goldman interviewed to become noncredentialed teacher A's from IA activity instructors, there were no additional educational or other requirements imposed as conditions to their filling the jobs. Silva-Broussard attended at least two training sessions while he was an IA activity; one dealt with administering medications and the other concerned dealing with stress. After becoming a noncredentialed teacher A, according to Silva-Broussard:

The training has been—well, I guess there hasn't been that much training that I can remember. We did have many meetings on how to improve the facility, and—well, there was one training where we had dealt with how to deal with one another as staff members.

And we're in the process of having open conversations on how to use crisis intervention more effectively, and I see that as a training. That's a very—but it's in its beginning stages.

In 1978 the IA activity and milieu jobs were performed by individuals called group counselors. After the name change

in their positions, they remained part of the unit and all were required to have a bachelor's degree with the proviso "experience and outstanding qualifications may be substituted." The record does contain one instance of reliance on this proviso. The educational requirements for all these portions have not been shown to have been altered since 1978.

Respondent has taken some steps which facially distinguish IA activity instructors from noncredentialed teachers A, but at least some of these actions appear to have been in contemplation of the instant hearing. For example, the noncredentialed teacher A job description lists as a duty "May participate in interviewing and evaluation of an IA or AIA staff. Input may be solicited for probationary annual employee performance appraisals." Silva Broussard, for the first and only time as a noncredentialed teacher A,³¹ was asked to participate in the evaluations of substitute teachers several days before he testified. Goldman was not similarly asked to participate in the evaluation process. There was no explanation of why such activity occurred immediately before this hearing, or why Goldman was not given similar duties. There was also no explanation of why this duty is indicative of professional standing under the existent circumstances.

The described training does not lead to certification or advanced degrees which would qualify noncredentialed teachers A as professionals. Assuming their experience and training did qualify them as professionals, then the qualifications of IA activity instructors is sufficiently comparable to entitle them for the professional same classification. Further, Respondent provides special training to all employees participating in the treatment of the children, including the group counselors. If there was any increase in training during the 1990–1991 school year, the record fails to support a finding the increase was due to noncredentialed teachers becoming professionals. Accordingly, I conclude there were insufficient changes in training and job duties to warrant finding these alterations remove the noncredentialed teachers A from the unit.

Respondent argues physical education and art teachers are not required by the state code to have teacher certification. The requirements of the State and local governments are not dispositive of this issue for Respondent is not required to provide enrichment courses, and the State does not require instructors or teachers of such courses to possess any professional degrees or training. Thus, Respondent's requirements are solely within its discretion. None of Respondent's

³⁰ Specifically, Respondent's job description for the nonpublic school special education teacher is:

EXPERIENCE: A minimum of one year experience teaching a special day class for seriously emotionally disturbed children. Experience in NPS or NPA setting desirable.

EDUCATION: B.A. and CA LH or SH credential as a Special Education teacher from an accredited college or university. MA in reading or learning disabilities desirable. Additional training in child development or counseling or psychology desirable. Eligibility for CA Emergency Specialist credential also considered.

³¹ Silva-Broussard was asked his opinion about one or more substitute teachers during his job interview, but the nature of the inquiry was not detailed and therefore cannot be equated to Respondent's assignment of the evaluation duty the Friday before Silva-Broussard testified. Further, there was no evidence Silva-Broussard or any other noncredentialed teacher A was qualified to perform the duty either by experience or personal knowledge. Silva-Broussard acknowledged the only time he observed the substitute teachers was when they passed his classroom. The frequency and duration of these observations were not shown to have permitted him to perform his charge to: "take a real close look at how we felt they were doing and be honest about filling out the forms, and notice their weaknesses and their strengths within the program and if it was a thing—something that you didn't know about, just put not applicable." I find this activity does not qualify to render noncredentialed teachers A supervisors within the meaning of the Act. *Abilities & Goodwill*, 226 NLRB 1224 (1976).

noncredentialed teachers A possess any licenses or credentials, unlike its teachers C.

Further, this argument fails to adequately address the skills needed by the computer science instructor, who did not appear and testify or if the state requires these instructors to have certificates. Houser's minimal description of this position is insufficient to permit finding this instructor meets the definition of a professional. "The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause." 2 Wigmore, *Evidence* § 285 at 162 (3d ed. 1940). See also *Iron Workers Local 600 (Bay City Erection)*, 134 NLRB 301, 306 fn. 11 (1961).

Respondent also argues the lack of credentials or license should not bar a determination the noncredentialed teachers are professionals, rather job duties should be the focus and determining factor. Citing *Chesapeake & Potomac Telephone Co.*, 192 NLRB 483 (1971); *University of San Francisco*, 265 NLRB 1221 (1982); *New School for Social Research*, 268 NLRB 1011 (1984).³² This argument is found to lack merit in the instant case. There is no evidence concerning the benefits afforded members of the staff including teachers C; social workers, psychiatrists or supervisor; other than wages. Teachers C are admittedly paid substantially more than noncredentialed teachers.³³

Another major difference between noncredentialed teachers and teachers C is the previously mentioned requirement teachers C possess or obtain special education credentials. Noncredentialed teachers are not required to have or obtain similar expertise in special education. In sum, I find the record demonstrates there is some evolution in the nature of the jobs performed by IA milieu and activity instructors, as detailed below, but these changes do not support a finding noncredentialed teachers are sufficiently different from IA's activity and IA's milieu to support a finding they now lack a community of interest with the other members of the unit or that IA's milieu and activity are not professionals while noncredentialed teachers are professionals.

Training is also argued by Respondent to be greater for noncredentialed teachers than IA's activity and milieu. The IA's activity and milieu received some training, but training was increased, particularly for noncredentialed teachers B. The record fails to support the conclusion, however, that the increase in training justifies the removal of these employees from the unit. Houser readily admitted the day services program expanded, and there is no convincing evidence IA milieu employees would not have received similar training if their position description had not been replaced. On the con-

trary, as noted above, the addendum to the IA milieu job description indicates Respondent intended to increase their training attendant to the increased education requirements. I find the job descriptions and duties are not so different as to warrant a finding the added training indicates noncredentialed teachers B are professionals and IA milieu instructors are not, or the training raised noncredentialed teachers B to the status of professionals.

The IA's activity and milieu as well as the noncredentialed teachers attended staff meetings each Monday and Thursday. The Monday meetings addressed "agency" issues such as policy and procedures, and announcements of events such as field trips or upcoming IEP's. The Thursday meetings involve discussions of the problems encountered in dealing with individual students. The social workers would discuss their students, briefing the staff on their progress and particular problems or techniques in better meeting a child's classroom and/or milieu needs. Further, on occasion, IA's activity and now noncredentialed teachers A, would receive training from Respondent's staff, such as social workers, psychiatrists and Houser. IA's activity, according to Houser, also received outside training in their field of instruction such as art or computer science. As noted above, Silva-Broussard attended two outside training sessions, one concerning the subject of medication and the other stress.

The training regimen for noncredentialed teachers A appears to be similar to that instituted for the IA's activity. Silva-Broussard and Goldman did not indicate they were required to receive additional training before or after commencing work as noncredentialed teachers A. According to Silva-Broussard "I guess there hasn't been that much training that I can remember." The two training sessions he attended as a noncredentialed teacher A were: (1) a session conducted about 3 months before this hearing on how to deal with other staff members, and (2) a session conducted about 3 weeks before this hearing relating to the use of crisis intervention.

Goldman admitted he did not receive any training in teaching related subjects such as educational motivational techniques or how to prepare a lesson plan.³⁴ He did receive about 6 minutes training about how to prepare a budget. There is no evidence Silva-Broussard or other noncredentialed teachers A received similar budget preparation training, thus this Goldman training may have merely been a supervisor's attempt to eliminate a job deficiency which existed while Goldman was an IA activity.

IA's milieu also received job-related training at Monday staff meetings, such as "how to manage assaultive behavior safely" and psychodynamic terminology. They received training from other employees such as social workers and

³² This case determined the appropriateness of including part-time faculty in a faculty unit. In determining community of interest, the Board considered such factors as, differences in compensation, participation in university governance, eligibility for tenure, working conditions, eligibility for insurance benefits, similarity of employment contracts, wages, and special expertise. See also *New York University*, 205 NLRB 4 (1973).

³³ Teachers C are paid \$13.72 per hour, noncredentialed teachers A receive \$10.15 per hour compared to what the IA activity received, \$8.56 per hour. Noncredentialed teachers B receive \$8.56 per hour, while IA milieu received \$7.67 per hour, the same pay rate as group counselors. The increases given the noncredentialed teachers still afford wages closer to unit employee positions than the nonunit positions Respondent claims are professionals.

³⁴ Lesson plans were introduced into evidence ostensibly prepared by Joe Ferrie, a physical education noncredentialed teacher A, Laura Annino, the computer science noncredentialed teacher A and April Hamilton, an art noncredentialed teacher A. There is no evidence these noncredentialed teachers independently prepared these documents without substantial direction and assistance from credential teachers and/or supervisors. None of these employees testified and/or laid the appropriate foundation for these exhibits to permit a finding concerning the duty to prepare lesson plans. I have not found these exhibits probative of Respondent's contention noncredentialed teachers are properly excluded from the unit because of such added obligations as preparing lesson plans.

psychiatrists on Wednesday afternoons when there were no psychiatric staffing scheduled. Like the IA activity, the IA milieu employees received outside daylong training. Informal training sessions were also offered to IA's milieu through individual meetings with their supervisors, including discussions about: their duties, how to improve their methods of dealing with individual children, intervention techniques, individual treatment plans (ITPs), and, according to Houser, "questions about [their] personal performance; requests for training and resources; discussion about ideas for the program. It's a chance to problem-solve, get feedback, get support. A lot of times they just talk about how you're feeling and doing. It's a very stressful job."

The noncredentialed teachers B receive similar training. Geller, a new employee, went to one training session outside Respondent's facility. Geller appeared to try to fashion his testimony to favor the Respondent. For example, he claimed the noncredentialed teachers B were continually sent to training sessions outside Lincoln, but admitted he only attended one such session. The noncredentialed teachers B do have regular meetings to assess the efficacy of their methods of dealing with children, called interventions. There was no clear evidence IA's milieu did not and would not have received similar training, particularly concerning their intervention techniques. Houser, as noted above, insured IA's milieu also developed their intervention techniques.

During the 1990-1991 school year Respondent conducted a 5-week training session held on Friday afternoons attended by staff, including a secretary and receptionist, social workers, and some noncredentialed teachers. This course was taught by a school social worker and included such subjects as appropriate physical management of children, psychotropic medications and team building. Two sessions of this course were conducted by an outside trainer who dealt with the use of the quiet room which was set up for the 1990-1991 school year, and another session on interpretive work. As noted elsewhere, not all, if any, noncredentialed teachers B attended.

The impact of the addition of the middle school with more severely disturbed children accounted for some of the training, such as use of the quiet room and the use of intervention techniques with older more disturbed children. The above-quoted addendum to the IA milieu job description indicates Respondent intended to increase the training of the IA's milieu as well as increase their participation in therapy and recordkeeping.

The IA milieu and noncredentialed teachers B were involved in teaching the children "life skills," which includes teaching appropriate behavior between other children and themselves and how to deal with stresses. Babcock, when he was a group home counselor in the IRT program, also received training. These group counselors were not part of the unit. The basis for their exclusion from the unit was not contained in the record. For the year he was a group home counselor, he attended seven training sessions run by Lincoln staff concerning behavior modification treatments and group therapy treatment. Further, he attended one training session outside the home, involving group dynamics. According to Babcock, Respondent inquired who would like to go to the outside training and he volunteered. Also attending this outside training from Lincoln was a psychiatric counselor, an-

other a group home counselor, and an individual whose position Babcock did not know.

The noncredentialed teachers B did not claim they received training in how to use the quiet room, which was a new innovation for the 1990-1991 school year. Pellegrini testified training has improved as follows:

We have the lead social worker doing much of the trainings with us now, so that they can be done in more of a clinical and therapeutic fashion. And the social workers are guiding us and teaching us what they want for the best of the children.

This improvement of training technique and quality was not clearly distinguished from the number and quality of the training received by the IA milieu. These 1 hour and 15-minute training sessions with the social workers are held every 2 weeks. The IA milieu were sent "out to trainings as needed." Geller's testimony the noncredentialed teachers B continually had training could be analogous to the discussions the group counselors have between themselves or at the weekly meetings they have with the social workers or the frequent staff meetings attended by both the IA activity and milieu instructors during the 1989-1990 school year. The noncredentialed teachers A and B and group counselors have regularly scheduled weekly meetings with the social workers.

The training of the noncredentialed teachers B, as was the case with the IA's milieu, involved interventions with children in crises. The sum of Respondent witnesses' testimony concerning interventions is their positions involve a continuing learning process, which of necessity is developed and honed by experience and sharing information with other staff members, and it was not, according to Pellegrini, formal training. None of the training received by the noncredentialed teachers B is aimed towards receipt of a teaching credential or any type of licensure as a social worker or teacher C.

Both Geller and Babcock work in the middle school for the new program involving very emotionally disturbed children who have been previously hospitalized. The recency of this program and the employees may account for some of the need for more extensive training compared to established programs, such as their counterparts in the elementary school or the group counselors. Respondent did not call one elementary school noncredentialed teacher B and this failure was not explained. Since both Geller and Babcock were new to Lincoln, they could not compare the duties of a noncredentialed teacher B to an IA milieu instructor. Pellegrini had just been appointed a supervisor. I find Pellegrini patently designed his testimony to fit Respondent's theory of the case. He appeared reticent to answer questions on cross-examination. He did not seem open and honest. Accordingly, I credit his testimony only when it was convincingly corroborated or was an admission against Respondent's interests.

Group counselors are required to attend six in-service training sessions at the commencement of their employment. Each training session lasts 1 whole day and include such subjects as physical restraints and how to spot sexual and physical abuse. These training sessions dealt with child development and appeared analogous to teaching life skills similar to the training received by the noncredentialed teachers B. According to Reis, she was told by her supervisor,

Clarence Johnson,³⁵ during a staff meeting, that group counselors had to receive 40 or 44 hours of training a year as a licensing requirement. While group counselors are required to have a bachelor's degree,³⁶ they are not required to have a specialized degree like those stated in the job description for the noncredentialed teachers. However, the group counselor's job description requires: "Must demonstrate commitment to professional growth and an increasing clinical skill by participating in training opportunities provided in the job." Further, Respondent has an established practice of substituting "experience and/or outstanding personal qualifications" for education, and does not require specific degrees for noncredentialed teachers A. Accordingly, I do not find the educational requirements of the various job descriptions demonstrate a lack of a community of interest which renders the group counselors nonprofessionals while the noncredentialed teachers are professionals.

According to McKale, recent state legislation requires group counselors receive "40 hours of training per full-time equivalent. Not to each full-time equivalent, but per full-time equivalent. So someone may get 120 hours, and somebody else might not get any training." This legislation went into effect July 1, 1990. According to McKale "the training must allude to treatment or care of individual children or children in the care of the group counselor." Interestingly, there is no difference between training in the treatment and training in the care of the children in these new regulations. McKale admitted group counselors receive training in both the treatment³⁷ and the care of the children, not just to act as glorified baby-sitters.

Reis also went to a training course off Lincoln's campus the summer preceding her testimony. The daylong course dealt with residential treatment programs. Further, as part of her master's program, Reis attends weekly meetings with her clinical supervisor, which centers on studying marriage, family and child counseling. Reis has also received from Lincoln training in crisis intervention. Reis has completed post-graduate studies in chemical dependency for which she was certificated.

In conclusion, I find the educational and training standards of the IA activity, IA milieu instructors and group counselors compared to the noncredentialed teachers do not warrant removal of the noncredentialed teachers from the unit. Many of the distinctions Respondent attempts to draw are distinctions without a difference, and the changes in the job descriptions do not reflect changes Respondent necessarily follows. I agree with McKale, as reported by Silva-Broussard, the IA activity and IA milieu instructors were as professional as the noncredentialed teachers.

In contrast to the training of the noncredentialed teachers, and other unit employees, the Federal and state requirements for the teachers C are much greater, and Respondent has not

established this classification of employees are professionals. See *Lewis University*, 265 NLRB 1239 (1982). The amount of discretion teachers C can exercise over course content without approval from a supervisor, the method by which time and place of classes are determined, when and under what circumstances a class can be missed to attend professional conventions, who determines class size, grading procedures and policies, and other indicia of responsibility and authority are not clearly established in this proceeding for teachers C, IA activity, IA milieu and noncredentialed teachers A and B. Some of the teacher C's duties are prescribed by State and other regulations. The students' progress is evaluated by a committee establishing or reviewing the IEP, and teachers C and noncredentialed teachers A and B are not free to reconsider or change the IEP. Thus, assuming Respondent established the noncredentialed teachers' duties and authority are analogous to the teachers C; Lincoln has not established teachers C are professionals.

4. Supervision

There is a difference in the nature and type of supervision of teachers C compared to the supervision of the noncredentialed teachers. The IA's activity and noncredentialed teachers A were supervised by Assistant Director-Program John Jones, or his predecessors, who were assistants to Houser. Jones was an IA activity physical education instructor along with Goldman during the 1989-1990 school year. Jones did not appear and testify, his absence was not explained which warrants an adverse inference. Jones was not shown to possess an advanced degree or any special training in special education, in fact, there is no indication he was specially qualified to teach or supervise IA's activity or noncredentialed teachers A.

Similarly, the noncredentialed teachers B are supervised by Mike Pellegrini, Life Skills Supervisor, who was promoted to supervisor for the 1990-1991 school year. Before that he was an IA milieu. He has a B.A. in sociology, but there is no evidence he took any course work dealing with seriously emotionally disturbed children. There is no evidence he possesses special licenses or credentials. Pellegrini is supervised by Jones. While Geller³⁸ testified the noncredentialed teachers B could consult with the social workers without supervisory approval, Pellegrini testified they had to follow the protocol of first discussing with him what they needed to consult the social worker about and receive his permission before they could talk to the social worker. Pellegrini's admission against interest is credited.

I further find group counselors receive less supervision than either noncredentialed teachers A and/or B. The noncredentialed teachers' supervisors see their employees

³⁵ The record is devoid of evidence concerning Johnson's education and experience to analogize the supervision of IA activity and IA milieu instructors as well as group counselors, with noncredentialed teachers A and B.

³⁶ The parties stipulated the group counselor educational requirement of an A.B. or B.A. refers to a bachelor's degree.

³⁷ Treatment, according to McKale, is defined in the State's regulations as "management of assaultive behavior, separation of children from their families, working with the children in a group setting."

³⁸ Geller did not appear forthright throughout his testimony. He gave the impression of trying to please his employer and tended to engage in hyperbole rather than attempting to present the facts. For example, he testified the noncredentialed teachers B were continually being sent out to trainings run in the community, yet when asked how often he attended such trainings, he admitted "only once." He also indicated he was authorized to independently contact social workers and devise new interactions with the students "without needing to obtain authority from anyone else." This was contradicted, as noted above, by his supervisor, Pellegrini, who testified Geller was required to follow the protocol of first obtaining his authorization.

daily. There is no evidence the group counselors are as closely supervised. The group counselors were shown to work with much greater independence than the noncredentialed teachers.

The group counselors are supervised by Shabbas. Shabbas' professional qualifications were not presented. However, Steven Herman, a social worker, testified he supervises one group counselor. Reis testified without refutation from any of her direct supervisors that she has "little supervision"³⁹ while the supervisors of the noncredentialed teachers indicated they closely supervise their employees.

In contrast to Jones and Pellegrini, teachers C are supervised by Miller and Ward. Ward did not appear and testify. Miller was a new employee hired as elementary school coordinator for the 1990–1991 school year. In addition to having a B.A. degree, he has a graduate certificate in special education. He supervises the teachers C and IA Classroom employees directly and the noncredentialed teachers A through Jones. The social workers are supervised by a lead social worker who Respondent requires has at least a master's degree. The lead social worker is considered part of Houser's management team along with the accounting manager, the director of residential services, the director of day services, the operations manager and two supervisors, Clarence Johnson, the supervisor of the residential program on campus, and Cheryl Wilson, an assistant program director for the school. Thus, the direct supervisors of the noncredentialed teachers are not considered part of the management team.

Accordingly, I find the noncredentialed teachers are not directly supervised by recognized professionals, rather, they are supervised by Jones and Pellegrini who, the preceding year, were members of the unit as IA activity and IA milieu instructors, respectively. There has been no demonstrated change in the nature and quality of the supervision given noncredentialed teachers compared to IA activity and IA milieu instructors. The supervision of the noncredentialed teachers does not constitute such a change as to warrant finding a lack of a community of interest with the unit members or otherwise justifies their unilateral removal from the unit.

5. Job duties

a. Noncredentialed teacher A

I find the noncredentialed teacher A position is not substantially different from the IA activity position and any differences do not warrant its exclusion from the unit. The asserted changes in the position are mostly superficial. As Silva-Broussard testified, without contradiction, during his interview for the noncredentialed teacher A position, his supervisor, Jones, admitted,

basically we'd been doing the job for quite a while and that the positions that were renewed or the new job description just defined the job that we had been doing, along with a few other things that were added.

For example, the "participate in parent/guardian conferences and maintain quality communication with stu-

³⁹ Reis testified without contradiction she is supposed to meet with her supervisor, Clarence Johnson, once a week, but they do not meet that often, they meet only when "necessary." She also stated Johnson "rarely goes in the units to supervise us in the milieu."

dent's home consistent with treatment programs, guidelines" on the second page, that wasn't in the old job description, but I have had meetings with parents where we had to discuss some of the behaviors that one particular child was going through.

The record fails to demonstrate the noncredentialed teachers A no longer share a community of interest with the remainder of the unit. The computer course is taught by Laura Annino, who did not appear and testify. There is no evidence her duties or other attributes of her position were any different in the 1990–1991 school year than they were during the 1989–1990 school year. Physical education was taught by Vince Goldman and Marion Pearson. Only Vince Goldman, who was terminating his employment with Respondent on the day he testified, appeared. Art was taught by Margo Stills and Ralph Silva-Broussard.⁴⁰ Still did not appear and testify. I also note the individual that held the position of IA milieu and became a noncredentialed teacher B did not appear and testify.

As previously noted, I further find Respondent considered the IA activity and IA milieu positions to be professional. As previously referenced, Silva-Broussard, testified, during the September 19, 1990 meeting:

I remember Mary Ann McKale saying that she felt that the position had always been a—a professional opinion [sic] and that getting around to recognizing that—and that actually—acting on that—and actually turning it into the professional position that they felt it was.⁴¹

I credit Silva-Broussard based on his open and honest demeanor. He is an employee who looked uncomfortable providing testimony he perceived as antithetical to his employers' interests, but he also appeared determined to be candid regardless of the consequences.

When Silva-Broussard was asked his current job title, he replied "It's either IA activity or—Non-credentialed teacher A." This reply indicates there was no substantial difference in his duties. Respondent argues it has implemented a team approach which has lead to the professionalization of the noncredentialed teachers for they must work with the social workers and teachers C.

I find many of these duties are dictated by Federal, state, and other legal requirements, and the duties of the noncredentialed teachers are not substantially different than the IA activity and IA milieu instructors. *Rice Food Markets*, supra, 225 NLRB 884.

Each student at Lincoln School has an individual education program (IEP), which is a formal document drawn by each school district. According to Houser:

So, when a child is referred, out in the community, to special education, they're referred to any study team on

⁴⁰ Joe Ferrie was also an IA activity who became a noncredentialed teacher A and Orlando Harrell was an IA milieu who became a noncredentialed teacher B. They did not testify and their absences were not explained.

⁴¹ On cross-examination, he similarly testified:

Mary Ann McKale said that she felt that the positions were already professional positions and that the job descriptions just were changed to fit the jobs that we already—that we were already doing.

a school site. And they meet as a group, decide what kind of testing and diagnostic needs to be done, and so forth, to determine whether that child meets the eligibility criterium for qualifying for any special education services.

If they determine that the child does, in fact, meet the criterium [sic], then an IEP meeting is held. A legal IEP meeting must include the chair of the meeting, who is usually an administrator of the school district, either of the site school or the downtown office; the credentialed teacher responsible for that child, responsible, in that case, means on that teacher's register for that year; and the parent or guardian.⁴²

And that document will spell out the particular individual services that that child has qualified for. It will also include basic identifying personal information, such as their name, phone, address, guardian phone and address, their age, birth date, assigned grade level, ethnicity, primary language and so forth.

Designated instructional services and additional services, such as summer school, transportation, speech therapy; all those things have a place on the form where they would be added. 3532 mental health services has a place on the form now in California.

Q. I don't understand that, a place on the form. What's done with that place on the form?

A. It means that, somewhere on the form, there would be a place to either write in that service, if it's being permitted for that child, or to check it off, or to cross it off. Again, every district's form is different. So, I can't just explain an IEP form. But, there's some place on that form that will cover all these different pieces of information.

Children from about 16 school districts are currently attending Lincoln. Some districts are more generous than others in the services they will pay for, which could include such special items as speech therapy, summer school, special day classes, counseling services, and a one-to-one instructional assistant formerly called a tutor.⁴³ Respondent has the child's social worker attend the IEP meetings. IA activity, IA milieu, and noncredentialed teachers do not attend IEP meetings.

The IEP also details the goals, objectives and methodology for meeting the stated goals and objectives of the plan. The IEP contains an assessment of the child's current level of performance which could be the results of testing and/or subjective observation. The goals could include academic objectives such as improve the students reading skills. There could be social and emotional objectives, such as "improve relations with peers" which would contain the goals of reducing provocative behaviors in the classroom or reducing aggressive acting out during play. The goals cover a 12-month period.

⁴² The governing State Statute, Education Code Sec. 56341, further provides the special education school may, in its discretion, permit requested additional staff to attend the IEP meetings, such as a speech therapist for a child needing or receiving speech therapy.

⁴³ The name change was occasioned by a rule change which eliminated tutors as a reimbursable service.

The goals dictate to some extent the involvement of Respondent's staff. For example, if the child has a physical disability, certain modifications to their physical education program may be implemented. The modification of job title or other factors have not been demonstrated to have altered this basic responsibility.⁴⁴

Respondent also develops an individual treatment plan (ITP) which results from a meeting called a psychiatric staffing. A psychiatric staffing is held every 6 months for each child resident at Lincoln. The social worker assigned to that child prepares prestaffing notes, which are working notes for the psychiatric staffing meeting. Houser described the ITP as

usually about a two-page list of the child's original presenting problems, goals for discharge plan, and then the social-emotional or clinical, therapeutic goals that the child must achieve. And some kind of methodology and means for evaluating those. And, in addition, there are usually goals for the parent or family.

And these are goals that essentially drive the entire Lincoln program; what needs to be done to help that child get well enough to be able to be discharged from Lincoln Child Center.

The two meetings are in tandem. In other words, the six-month cycle doesn't—for the ITP and the IEP, don't happen together. But the IEP, the members of the team from Lincoln, try very hard to make sure that some of the goals that are on the ITP also appear on the IEP, so that there's some sense and overlap between the two documents.

The staff reviews the goals of the ITP every 3 months and rewrites them every 6 months. The goals may seem similar to those described on the social-emotional section of the IEP and could be very broad, such as "improve self-esteem," or very specific, such as "decrease nighttime enuresis." The ITP would contain the method for implementing the treatment to achieve the stated goal.⁴⁵ The ITPs are prepared by Respondent's staff using a compendium of materials prepared by the different staffs who have contact with the individual child whose ITP is being prepared or revised. IA ac-

⁴⁴ There was contradictory evidence whether IA's activity and noncredentialed teachers A attend IEPs. Houser stated IA's activity were never invited to attend IEPs but noncredentialed teachers A did receive such invitations. I do not credit this testimony based on her demeanor, which was unconvincing and appeared self-serving. Silva-Broussard openly and forthrightly testified he was invited to attend IEPs but elected to miss the meetings which were scheduled during his workday and he chose to meet other work assignments. Silva-Broussard credibly claimed the invitation to attend IEPs remained the same after he became a noncredentialed teacher. Supporting this conclusion is Houser's admission that the noncredentialed teachers are scheduled to attend other meetings at the same time IEPs are calendared, making it infeasible for them to attend the IEP.

⁴⁵ Houser, while describing the ITP, admitted she is most familiar with the day services program, and is "much less versed in the residential treatment ITP, as it currently exists, although I'm very familiar with how it existed from, say, 1980-to-'85, when I worked with that program." The group counselors work in the residential program and her admitted lack of familiarity with this program since 1985, renders her testimony concerning the duties of the group counselors unreliable, at best.

tivity prepared staffing notes as do noncredentialed teachers A.

Silva-Broussard described the IA activity and noncredentialed teacher A duties as including helping the students meet the goals contained in their respective IEPs and ITPs. In both positions he would frequently write staffing notes⁴⁶ on the children to assist in evaluating their progress toward attaining their stated goals. Silva-Broussard testified there was no difference in the staffing notes he prepared as an IA activity and those he prepared as a noncredentialed teacher A. He did not participate in the preparation of the IEPs as either an IA activity or noncredentialed teacher A. Neither the IA's activity or noncredentialed teachers A were permitted to participate in the formulation and drafting of the IEP beyond the staffing notes,⁴⁷ but could participate in the ITP meetings. However, like the IEP meetings, the psychiatric staffing are generally scheduled during the noncredentialed teachers A work hours, so they do not attend. Silva-Broussard added drawings to his staffing notes when he thought they would assist the therapist. He also keeps dated running records of the students' drawings. Houser, on cross-examination, admitted IA's activity, like noncredentialed teachers A, also included both subjective and objective observations in their prestaffing notes.

Noncredentialed teachers B are also permitted to attend psychiatric staffing, but Geller admitted he rarely attends these meetings, in contrast to the group counselors. Pellegrini admitted the noncredentialed teachers B play an identical role in the psychiatric staffing as the IA milieu in 1989–1990. Respondent argues the noncredentialed teachers B prestaffing notes are more detailed and utilize a statistical⁴⁸

⁴⁶ He described the staffing notes as:

A description of how that student was doing in the classroom; a lot of times I included some of the art work and the therapists, along with a lot of the staff members, would attempt at analyzing the art work—just describing how that student did with his peers, how they're interacting with—he/she was interacting with his or her peers; how the student interacts with adults; what kind of bonding is going on if that child was—sexually acting-out—you know. Those sorts of things.

⁴⁷ Respondent refers to notes or reports as prestaffing notes, and according to Houser, they are prepared by each teacher which has contact with the child and include subjective and objective material. For example, the computer instructor would include types of software the child was using, what level of difficulty they were able to work at in the computer room, amount of time spent on tasks in the computer room, touching on both their strengths, such as peer relations or response to her authority was a strength, and their weaknesses, such as attention to task or distractibility, or if they have fine motor difficulties that are evident. Being able to use a keyboard requires significant fine motor coordination.

⁴⁸ For example, the number of times a child has been to backup, the amount of time the child remained in backup, and the use the child made of the time spent in backup, such as engaging in verbal skills rather than physically acting out. Respondent admitted noncredentialed teachers B had not received any training in statistical analysis, and their duties merely included simply counting the times a child was in backup and the duration of each stay. The evidence does not support a finding the statistical and other record keeping performed by the IA's milieu and subsequently the noncredentialed teachers B, is more than "routine mental, manual, mechanical, or physical work . . . requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and

and team approach. The addendum to the IA milieu job description implemented this change in approach by including data collection and in the general requirement to "maintain records as required," and "using clinical insights" to perform their duties, including "report through educational and clinical notes."

Respondent contends the requirement noncredentialed teachers "develop and implement a curriculum consistent with State requirements including Department of Education and individual students IEP and treatment goals and agency philosophy." causes their jobs to become professional. The lesson plans placed in evidence do not support this contention.

While Silva-Broussard did not develop a formal curriculum⁴⁹ in 1989, he developed projects which were approved by his supervisor if they were "clinically sound and had a clinical base to them." These meetings were usually held in the mornings prior to classes. The IA's activity attended weekly staff meetings held every Monday afternoon; also attended by a secretary to take notes, management, IA's milieu, teachers C, therapists, and on occasion, Cheryl Wilson. These Monday afternoon staff meetings were to discuss plans for the week, including field trips, and they would discuss with the therapists particular students, and in general discuss how students were progressing to permit improved "work with the kids." Respondent failed to demonstrate the frequency, nature and/or content of the meetings substantially differed from those held the preceding years.

In general, Silva-Broussard followed the dictates of his job descriptions as both an IA activity and noncredentialed teacher A. He understood his IA activity job description required him to develop and implement an art program. The curriculum he developed in 1989 evolved in part from the staff meetings and discussions with his supervisor. For example,

[Silva-Broussard remembered] one instance where one child was drawing real abusive-type drawings, real sort of self-inflicting type drawings. And I met with Chris [Wagner, his immediate supervisor] and we drew up a contract that we would allow that child to do these drawings if he would draw first three drawings that we deemed as appropriate.

So—you know, that's sort of the way it happened. If I saw something happening in class that I thought was not to the student's best interest I would approach my supervisor and ask her about it and she would expect that of me.

I conclude Respondent has failed to demonstrate the noncredentialed teachers A have greater or otherwise substantially dissimilar responsibilities for developing curriculum

study . . . " as required by the Act to deem the activities "professional." Sec. 12(a) of the Act.

⁴⁹ It appears Houser prepared the family life curriculum for the noncredentialed teachers B, who then followed her dictates. I find the record fails to support Respondent's claim the noncredentialed teachers were responsible for and did independently prepare curriculum following the state requirements. The record is devoid of any evidence any of the noncredentialed teachers knew of the state requirements or received any instruction on how to prepare a curriculum.

than the IA's activity. During the 1989–1990 school year the IA's activity were assigned 45 minutes a day to aid in backup, where the IA milieu worked with students "in crisis." During the same year, Silva-Broussard was responsible for ordering materials and supplies as well as doing the shopping at different art stores. He had a budget of about \$2000 for the two art classes he taught. Consonant with his job description, he also strove to "develop group handling techniques," including methods of handling children in crisis.

As a noncredentialed teacher A, Silva-Broussard does not have regularly scheduled 45-minute periods for backup, instead he is allowed to use that period either to go to backup or work on his own teaching program. In fact the noncredentialed teachers A job description appears to contemplate they will be regularly scheduled to Backup.⁵⁰ He still relies on the job description as the basis for his understanding of his duties. The main difference in his job as a noncredentialed teacher A is he has to prepare lesson plans. As he did as an IA activity instructor in preparing his curriculum and lesson plans, he is guided by the students IEPs and ITPs. Another difference is he has bus duty in the morning and recess in the afternoon, which he did not have as an IA activity instructor.⁵¹ As both an IA activity and noncredentialed teacher A Silva-Broussard participated in parent/guardian conferences. His participation as an IA activity was pursuant to a request by his supervisor. During the 1989–1990 school year, Silva-Broussard, without being directed to, notified his supervisor whenever a student engaged in "macabre-type imagery" or "obsessive" behavior. For the 1990–1991 school year, he was instructed to notify his supervisor when children engaged in these behaviors.

According to Silva-Broussard, the preparation of lesson plans was not considered as requiring much, if any, change in his preparing a curriculum, he testified he "has done the projects so often that it's second nature, so there's very little planning." He did plan future projects for his students, but never formalized these plans when he was an IA activity. Goldman conceded he never received any training how to prepare a lesson plan. Further, Goldman admitted his lesson plans were drawn up either immediately before class or only for the week, not with the professionalism of a certificated teacher, which Respondent described as containing year long teaching goals.

Respondent refers to the testimony of Goldman as illustrative of the professionalization of the position with the new job duties imposed on noncredentialed teachers A. Goldman testified he did not instruct his students during the 1989–1990 school year and did not participate in the staffing meeting, rather he slept through them. He further claims this year

he has goals for each student and actively participates in the meetings. I find his testimony is not at all persuasive on the issues in this proceeding. Based on demeanor alone, I can not credit his testimony. Initially, he did not appear to be attempting to tell the truth. He did not testify in a convincing manner. Secondly, much of his direct testimony was adduced by the device of leading questions. Another consideration is he was a difficult witness on cross-examination. Further he admitted not performing his job duties during the 1989–1990 school year. That he is now performing these duties does not merit his removal from the unit. Further, there is no evidence he received any training during the 1989–1990 school year which would qualify him as a trained physical education teacher.

Houser testified she altered the 1988–1989 job descriptions for the IA activity instructors as follows:

—is the emphasis in the duties. Not even the actual duties, but the emphasis.

And it's very gradual and subtle, what it's talking about there. So, if someone was out—I think it refers to basketball as an example—just letting the kids play basketball, instead taking a more proactive, instructor's kind of role, teaching some basketball skills.

So, it was an attempt to kind of push people along from just an activity leader to taking more responsibility for instruction, to improve the quality of the program.

So, that was my emphasis, was improving the quality of the instruction during the nonacademic parts of the program. But I'm not sure that translated into specific duties on the job description that were reworked.

Thus, according to Houser, Goldman's duties during the 1989–1990 school year required him to teach skills and his admitted failure to meet these requirements during the school year is unrelated to his job duties; I conclude, as inferentially admitted by Respondent, that he was merely a poor employee that year who was not required by his supervisors to do his job. The job description clearly required the IA activity instructor to develop a curriculum consistent with the student's IEP and ITP programs as well as the Respondent's other treatment goals.

As previously found, Goldman was not a believable witness, and his testimony will be credited only where it is adverse to Respondent's position or credibly corroborated. Goldman testified all he did as an IA activity was have fun with the students and as a noncredentialed teacher A he taught them skills. Houser testified his job duties as an IA activity included teaching the skills in the games played during physical education class.⁵² I conclude Goldman's duties were not significantly altered when he became a noncredentialed teacher A, he merely more fully met the job

⁵⁰ All employees of Respondent are required to provide assistance to Backup as needed. Currently, the noncredentialed teachers A have the option, when not needed, to spend time in Backup or work on their own programs. When he works in Backup, he does whatever is required to get the child through a crisis.

⁵¹ As previously mentioned, his job description includes writing evaluations of substitute teachers, but this duty was not imposed until immediately before the instant hearing in March 1991. There was no event or other basis explaining why, all of a sudden, this job description duty was actually imposed on Silva-Broussard or why Goldman did not have a similar duty. As found above, this duty does not qualify the noncredentialed teachers A as professionals or otherwise permit their removal from the unit.

⁵² Specifically Houser described Goldman's duties as:

A. I assume that the assistant director would've, through the course of their individual supervision, given suggestions for how they could present not just skills, but characteristics of, you know, quality social behavior—

A—to the children, in the course of working with them outside.

requirements during the 1990–1991 school year, such as not sleeping through Thursday afternoon staff meetings.

There is no evidence Respondent's noncredentialed teachers B prepared lesson plans, and Houser admitted not all of the noncredentialed teachers job descriptions have been implemented and she did know if the requirement noncredentialed teachers B prepare lesson plans was a duty they were performing.

There is nothing in the IA activity job description that would preclude or discourage the development of curriculum and lesson plans. Two duties listed in the document were: (1) "under the supervision of the Assistant Program Director, develop, and implement an art or physical education program consistent with individual children's IEP and treatment goals and agency philosophy" and (2) "develop group handling techniques consistent with milieu program and individual children's IEP and treatment goals." The job description for the non-credentialed teacher A position appears to define the duties to a greater extent, not to significantly add to them.⁵³

I find without merit Respondent's claim the noncredentialed teachers' work differs from the IA's activity and milieu for the noncredentialed teachers are directed toward achieving long-term goals. The noncredentialed teacher A job description appears to primarily explicate to a much greater degree the duties of the individual providing the elective instruction rather than significantly modifying their duties. This is apparent from Silva Broussard's testimony that he performed most of the same duties during the 1989–1990 school year as he did for the 1990–1991 school year. The addition of bus duty or formalizing the duty of preparing their curriculum by developing lesson plans does not so alter the job duties of the noncredentialed teachers A as to warrant a finding they would not be appropriately included in the unit for they no longer share a community of interest or have become professionals. I find the shift from crafts to more fine arts was done by Silva-Broussard based on his experience and proclivities as an instructor, not due to any intrinsic change in the activities program implemented by Respondent during the 1989–1990 school year. The IA activity and IA milieu job descriptions were not changed for the 1989–1990 school year.

Further, Silva-Broussard testified during his job interview for the IA activity position, Ms. Wagner reviewed the position description and described the job duties. He was in-

formed his duty would be "develop and implement an art program. For the students." Wagner's reference to the position description included the portion which provides "consistent with the individual children's IEP and treatment goals and agency philosophy." Consistent with these duties, while he was an IA activity, Silva-Broussard sought approval of various art projects during weekly staff meetings. After he was hired, his supervisor, Wagner, again reviewed the IA activity position description with him and again during his 1-year evaluation. I agree with his testimony, his job duties did not significantly change after he became a noncredentialed teacher A.

Both the noncredentialed teachers A and B continued to draw contracts with various children as a means of designing their work to meet that child's IEP and treatment goals. While Silva-Broussard initially claimed the work of the noncredentialed teacher A was more "psychologically oriented," he admitted he performed his duties "much in the same way." As an IA activity, he understood his job to require consultations with the social workers and other staff members as the occasion arose, and after becoming a noncredentialed teacher A he was formally instructed to provide the same services. He was never informed he exceeded his authority or position description when he was an IA activity.

There are some duties in the noncredentialed teacher A job description that apparently have not been implemented, such as "interviewing and evaluation of IA or AIA staff." As a IA activity he was asked by his supervisor, Wagner, to evaluate potential new hires as IA activity instructors, his opinion has not been sought on this subject since he became a noncredentialed teacher A. Another duty listed in the noncredentialed teacher A job description not implemented was to "Administer periodic standard testing measures and use record of results to set individual goals and improve teaching strategies." Silva-Broussard did not administer any tests.

In sum, I credit the testimony of Silva-Broussard that there was no difference between what he did as an IA activity and as a noncredentialed teacher A other than not having to "do cereal in the morning, and I'm not required to constantly be in backup." These differences do not demonstrate the IA's activity were not professionals while the noncredentialed teachers A were professionals as Respondent claims. I find these positions have very similar duties. Respondent's proclivity for altering job descriptions and the changes' effect in the noncredentialed teacher A position descriptions do not render lawful the replacement of IA's activity with noncredentialed teachers A and removal of the work from the unit.

b. *Noncredentialed teachers B*

The IA milieu position was created at the same time as the IA activity name change, when Respondent became a nonpublic school and needed to change the name of the group counselor positions to get funding, and not to reflect an intrinsic change in the nature of the duties performed by these employees. Houser added to the IA milieu job duties for the 1989–1990 school year by adding writing and record-

⁵³ For example, similar listed duties provide:

(1) "Under supervision of Assistant Program Director-milieu develop and implement a curriculum consistent with state requirements including Department of Education and individual student's IEP and treatment goals and agency philosophy for each elective subject taught"; "Modify and implement the elective subjects curriculum to meet the needs of children at diverse skill levels, ages and potentials"; and "Enrich class and student's instructional programs to meet their individual instructional and treatment needs, goals and interests using agency and community resources; and (2) "Use clinical insights, educational motivational techniques and a commitment to excellence in education to promote growth in the classroom and milieu"; "Develop effective classroom management techniques consistent with the use of the Back-up system, IEP goals and treatment plans and agency philosophy. Provide crisis interventions as scheduled"; and "Develop group handling techniques consistent with milieu program and individual children's IEP treatment goals."

keeping responsibilities.⁵⁴ For example, they were to keep daily notes which would report if a child had a crisis that day and was seen in backup. That information then was distributed to the group counselors so they could be aware of a possible repeat crisis.

Respondent claims it implemented a life skills curriculum which required the noncredentialed teachers B to assume professional duties. Houser described the duties of the noncredentialed teachers B as primarily directed toward prevention, intervening before a child has a crisis. They also function as short term substitutes for employees having problems with other children or who must be absent for a few minutes. The IA milieu job description included these duties. Noncredentialed teachers B also keep notes pertaining to students behavior, including any patterns they observe. As did the IA milieu employees, noncredentialed teachers B are active in crisis intervention. For the reasons stated below, I find the duties of the noncredentialed teachers B are not significantly different from those of IA milieu employees and do not permit their unilateral removal from the unit.

The only witness who had been an IA milieu instructor was Pellegrini whom I find is not credible. He appeared to be principally interested in presenting Respondent's case rather than the facts. Like Houser, he frequently volunteered information and engaged in hyperbole. For example, when asked to describe and then compare his work days for the 1989 and 1990 school years, he testified:

Q. Now, in 1989, can you describe what your typical day would consist of as an IA milieu?

A. In 1989, as back-up person, it was a back-up team, the three of us. Very behavior oriented. The children were coming out of class, there wasn't time or room or it wasn't in our makings to sit down and really process problems with the children. It was more, "You're out of class. That's inappropriate, that's not tolerated, go stand in the corner." It was very much discipline-oriented. Consequence oriented. Not a very therapeutic approach.

Q. Has that changed this year?

A. Yes, it's changed dramatically. Whereas I just stated that we were mainly behavior-oriented in '89, we have turned it around and have gone completely to a therapeutic model. So when the children come out right now, the first step isn't to say, "Do a consequence," or, "Go stand in the corner," or, "Write the lines." The first step is to sit down and ask the child what may be causing this problem. And then we work from those steps on.

Q. Now, you've mentioned the term "process." Does this have a particular meaning to you?

A. Yes. It's processing their behavior. It's, rather than—these are severely emotionally disturbed children. They don't know why they're acting this way. The

adults sometimes have a good idea why they're acting this way, and it's our job to teach these children that there are reasons for their behavior, and sitting down and walking them through their behavior, step-by-step, can help them improve that behavior, and, therefore, improve on their ability to stay in the classroom.

Q. And that differs from the behavior management or behavior oriented approach that you mentioned last year?

A. Yes.

Q. What was the behavior-oriented approach? Would you describe that?

A. The behavior-oriented approach would be cut out all the steps and it would be to dish out consequences, rather than take the time to try to help that child deal with these emotional problems.

The IA milieu also resorted to "interpretations"⁵⁵ during the 1989 school year but to a much lesser degree. Pellegrini claims during the 1990 school year the noncredentialed teachers B spent about 85 percent of their work day teaching the children coping skills, proper hygiene, grooming, relationships between peers, relationships between adults, and relationships between animals. The remaining 15 percent of their day would be other interactions with the children such as free time and other interventions. He estimates he spent about 10 to 15 percent of his time during the 1989 school year engaged in interpretations.

The two noncredentialed teachers that testified, Geller and Babcock, work in the IRT program, which was recently initiated and which Respondent claimed was "a non-union program."

Since the IA milieu and then the noncredentialed teacher B positions were outgrowths of the group counselor positions, a comparison of their activities in handling children in crises presents a more accurate assessment of any claimed evolution of the "backup" position.

Two group counselors testified, Mayeux and Reis.⁵⁶ They are on campus-based residential counselors. The group coun-

⁵⁵ Pellegrini defined "interpretations" as:

A. Like I just stated, the child will come out not really knowing why they're acting the way they're acting, and they're typically taking out a lot of anger, a lot of aggression, and a lot of what happened to them in their earlier life on some adult that has nothing to do with the problem at all. And interpretation would be to tell that child, you know, "I think you're doing this this way because of what happened, for example, over the weekend at home. Did you have a rough weekend at home?" Or, "It's really difficult for you to sit down and look at math, because you do have a learning disability." And that's an interpretation, telling them what you think their behavior is coming from.

Q. Is there anything you're attempting to teach a child when you're doing an interpretation?

A. That there's reasons for their behavior, and that they can stop before acting out and think, and then sort of diffuse the situation themselves. Try to teach them—that's why we're called life skills—try to teach them some life skills, some coping skills, that they can do this themselves.

⁵⁶ Mayeux has worked for Respondent since December 3, 1987, and Reis has been a group counselor at Lincoln about 2-1/2 years. In contrast, Babcock and Geller were new hires for the 1990-1991 school year. Thus, Mayeux and Reis had more experience in oper-

Continued

⁵⁴ Later in her testimony Houser claimed only Pellegrini wrote daily notes, the other two IA's milieu were not required to and she did not think they also made daily notes. This claimed disparity of duties contained in a job description from those actually required, further supports my finding the job duties related by Respondent or contained in the job descriptions are not probative of the individual status as a professional or otherwise or the appropriateness of their inclusion in the unit.

sors work in teams of two for eight children.⁵⁷ They oversee the children when the children are not in school, including evenings and weekends. Mayeux is also the only group counselor (medical appointments).⁵⁸ The job description for group counselors, summarizes their duties as: to provide supervision of the children in their care. To provide a healthy and therapeutic environment. To implement the psychiatric treatment plan. Reis reviews all the records for the children in her group, including the family history and psychiatric evaluation.

The group counselors are assigned on average two key children which they give additional attention, including regularly scheduled outings, such as taking only that child to a movie, or shopping to buy clothes. There are about 15 campus-based group counselors. As part of their duties they attend various meetings, including weekly "staff meetings" which last two and one-half hours, about four psychiatric staffing a year, meetings with teachers C, family visits, and group therapy sessions. The group counselor's also prepare reports; i.e., concerning children just admitted into the program, which contain the group counselor's first impressions of the student, such as apparent impairments of speech, language, concentration, or any other factors deemed helpful, including repeated behavioral patterns and whether the group counselor believes the child is "appropriate for the program;" daily logs;⁵⁹ incident reports; and, prestaffing reports.

ational matters than these new noncredentialed teachers B. The group counselor's testimony was not refuted by their supervisor, Shabbas, and I find, based on their convincing demeanor, that their uncontradicted testimony is credible. For the reasons stated above, I do not find the testimony of Babcock and Geller equally credible, they did not testify with convincing mien, they did not testify in an open unaffected manner.

⁵⁷ The noncredentialed teachers B, Geller and Babcock, work as a two-man team in the school milieu and are assigned about 13 children, while the group counselors work in the residence milieu.

⁵⁸ Mayeux holds two different jobs, one as group counselor and the other as medical transportation. He is the only employee that holds these two jobs. There is no other employee that is charged with scheduling medical and/or dental appointments, maintaining medical records and transporting the children to these appointments. Since going to the doctor is traumatic for the children, Mayeux tries to spend time after the appointment with the children, taking them for a treat, such as ice cream. He also fills out a medical report for the psychiatric staffing, which includes the child's medical history for the past 6 months, a recitation of their doctor's visits, including their last physical and dental examinations. Mayeux also takes one resident to public school, daily, and as part of this duty, meets with the students' teacher. He also picks her up at the public school and supervises her homework.

⁵⁹ Reis includes in the daily logs any changes in behavior, perhaps caused by an increase in medication, any impressions medications may not be effective, any disclosures by the child which may aid in their treatment, and any occurrences of sexual molestation reported by the child, including those which may have occurred during family visits. The contents of the daily logs are left to the discretion of the individual group counselors.

The examples of daily logs submitted by Respondent, according to Reis, were not typical, there are no typical entries for each day has different crises and different behavior problems to report. However she was not familiar with the logs of other group counselors. Respondent had Steven, Herman, a social worker, testify the daily log entries are typically short, but he admitted they vary from unit to unit and their usual content was not described. There is no show-

Noncredentialed teachers B also complete a daily log which is forwarded to the child's social worker and group counselors. The group counselors observe any behavioral or other problems or benefits occasioned by the drugs administered to the children as do the noncredentialed teachers B, and they both work to insure this information is incorporated in the children's treatment, such as medical constraints on their activities. Both noncredentialed teachers B and group counselors primarily work through a child's social worker in dealing with any major changes in a child's behavior. Both are involved in assisting the children to learn "appropriate behaviors." Noncredentialed teachers B attend weekly staffing, and in the IRT program they also attend ITP and IEP meetings. The staff meetings limited to noncredentialed teachers B and supervisors primarily involve discussions of different intervention techniques.⁶⁰

Mayeux detailed his work day which includes meeting the children returning from the school day. He characterized this time of day as a very difficult transition period so each child is sent to his/her room for quiet time and the group counselors try to talk with each child during this half-hour interlude to determine how their day was and if they experienced any problems. After this rest period, the children have a snack time, then recreation. During recreation, there are often confrontations between the children which the group counselors must resolve. The group counselors spend a lot of time with the individual children at this time, "talking to them about their problems, what's going on in their lives, how was their home visit this weekend, if they had one. If they never had a home visit, how do they feel about it." The record failed to clearly establish these activities were behaviorally rather than therapeutically oriented.

ing the daily logs prepared by the group counselors are not directed to the child's therapeutic goals or otherwise significantly distinguishable from the daily notes prepared by the noncredentialed teachers B. I conclude the daily logs submitted by Respondent were not convincingly shown to be representative samples of the logs prepared by most of the group counselors.

⁶⁰ Babcock indicated he was involved with many more interventions as a noncredentialed teacher B than as a group home [psychiatric] counselor in the IRT program. I find this testimony does not accurately reflect any differences in the duties assigned these positions for there are more children and there was insufficient credible evidence there was a substantive difference in these activities, particularly since Babcock was a group counselor and then noncredentialed teacher B for a short period of time, and was not shown to have had a sufficient base of experience in each job to warrant relying on the comparison. For example, he did not work weekends, and were there more behavior difficulties during weekends? Further, the group counselors in the IRT [intensive residential treatment] program are not part of the unit. The basis for their exclusion was not contained in the record. The position description for these psychiatric counselors was not placed in evidence and any differences between the activities of the psychiatric counselors and noncredentialed teachers B mentioned by Babcock were not shown to be attributable to differences in their job requirements rather than negligible supervisory changes. Based on the credited evidence, I find the differences in prestaffing notes, daily logs and other written materials, lies more with the writer than the position. There was no evidence from any supervisor in the residential program that detailed the programs requirements for these notes or what the group or psychiatric counselors were told compared to the noncredentialed teachers A and/or B.

Around 4:30 p.m., recreation ends and they have “store.” The children are graded on their behavior, they can earn up to 100 points daily and each day a child earns 100 points they are given a prize, such as a piece of candy or other treat to reward their good behavior. Weekly, the children with the most points is recognized and is permitted to pick a prize. There are different categories of prizes, with the largest prizes for those children earning the most points. The psychiatric counselors as well as the teachers C also award points and the noncredentialed teachers B can offer input to the teachers C but cannot award points. Next is preparation for dinner; then dinner.

Dinner is a difficult time, for there are some children who have eating disorders, which lead to conflicts. If a conflict occurs, one of the group counselors takes the child aside and counsels them. After dinner is another quiet time during which the group counselors talk with the individual children about their problems and counsel them. Then there is a free play time, where the group counselors again try to counsel the children. There are evenings when movies are scheduled, or a television time. Each set of group counselors devise a program for their group, which includes such events as shopping, going to the library, etc. Due to the nature of the children in their care, the group counselors devise schedules that are regimented, however the group counselors have responsibility for setting the programs for their respective groups. The children then take their showers and prepare for bed. Bedtime is again a difficult transition time for the children and the group counselors “spend a lot of one-on-one time with the children. This goes on for at least a half-hour, tucking the kids in, giving them a hug and a kiss, if that’s what they want, and most of them do.”

After the children are in bed, the group counselors take turns filling out the daily log which Mayeux described as a daily report detailing how each of the eight children “are doing.”⁶¹ The daily logs are given to the social workers. At 10 p.m., the night counselors⁶² take over and they work until

9 a.m. the next morning. Mayeux substituted as a night group counselor and was told he was to check that all the doors were locked, to check on each child and if a child has nightmares, to comfort him, to wash the children’s clothes, fold them for the children to pick up the next morning, and just ensure the children are safe. There are two night group counselors for 24 children. In the morning they assist in preparing the children for school or for weekend activities.

In the mornings, the group counselors report at 7 a.m., they help wake up the children and get them ready for school, change the wet beds, fix breakfast, and make sure the children do their morning chores such as clean their rooms and make their beds. Breakfast is considered an important time for the children, the group counselors want to make sure it is a quiet time where the children eat calmly and properly, such as using utensils instead of hands. The group counselors then check the rooms to ensure they are cleaned, check the children for appropriate dress and grooming, and, to counsel children who are experiencing problems at this time. At 9 a.m., the group counselors take the children to the nonpublic school.

At anytime during their shifts, a group counselor may have to engage in crisis intervention which could occur when two individuals get into a confrontation or they misbehave, such as trying to injure themselves or throw objects. The group counselors are responsible for choosing the technique employed to deal with the crises, from simply putting their hand on the child’s shoulder and talking to them to “full-blown restraint.” The group counselors are trained⁶³ in crisis intervention.⁶⁴ Both Reis and Mayeux are not directly supervised in intervention techniques they chose during crisis interven-

tion. The record of Lincoln Child Center, was not shown to have worked directly with the group counselors and therefore, her testimony was not demonstrated to be based on first hand knowledge. Accordingly, the record will not support any findings concerning the “professionalism” or other characteristics of the night group counselors. Similarly, there was not testimony from group counselors who work exclusively or primarily on weekends, thus I cannot find these individuals’ jobs are substantially different from those of non-credentialed teachers.

⁶³ Mayeux has attended three crisis intervention training sessions while employed by Respondent, the last about 6 months before he testified. The training sessions include techniques in restraint to insure neither the child nor the employee is injured; Respondent has strict guidelines to prevent injury. Another subject discussed was how to diffuse a crisis. The intervention selected by the group counselor is based on their intimate knowledge of the children in their care. As Reis testified “a crisis comes along, and you have to deal with them up to your clinical judgment or your discretion. They are spontaneous. We don’t plan when a crisis—and according to my knowledge of the children and their history, I act.”

⁶⁴ Reis described one intervention:

We have a child that experiences auditory hallucinations which are egodystonic. . . . The symptoms are alien to him. I mean, he knows that it is not inside of him. He knows that there is something that is not supposed to happen, but it is happening to him. He knows that it is not normal to hear voices. So he gets terrified. So he becomes extremely frightened. And I have to intervene in terms of, first of all, providing safety for the child. And then engage him on some sort of labor therapy, some sort of task, for him to be able to gradually come out of the psychotic break. And then, you know, alleviate his anxiety and then—and process and deal with that in those terms.

⁶¹ Mayeux gave the following example:

Say, for a child was having a particularly hard day, and you’d put, you know, would—why they were having a hard day, after you talked to the child and try to determine what was wrong with them, say, you know, his dad didn’t come pick him up this weekend and he’s really angry about it, but instead of telling us he’s angry about it, there’s stuff that he does, he hits, you know, somebody else. That’s to get his aggression out, you know, let some steam off. And we tell him that this not an okay thing to do, you know, we don’t allow violence, and a good thing to do is sit down and talk with us about.

And normally when that happens, when a process starts where you talk to a child, it works. They know you care about them and they care about you, and they’ll reveal what’s really bothering them a lot of the times. Not all the time, but a lot of the times.

⁶² The night group counselors are not assigned key children. The record does not clearly indicate if night group counselors have a separate job description. Many of the duties listed in the group counselor position description do not pertain to the duties described for the night counselors, which include doing the children’s laundry. The night counselors are present only during the hours the children are scheduled to be sleeping, but may have to deal with occasional problems. The frequency with which night counselors must deal with crises or other problems was not the subject of a night counselor’s testimony and Houser admittedly has not been involved in the residential program for years. McKale, while president and executive di-

tion and neither has ever been shown to have been counseled or reprimanded for the techniques they employed.

The types of crisis intervention used by group counselors compared to noncredentialed teachers B was the subject of extensive testimony. Respondent argues the intervention techniques employed by the group counselors are behaviorally based while those used by the noncredentialed teachers B are more therapeutically oriented. As used in this proceeding, behavioral techniques referred to punishments, such as writing assignments or standing in a corner rather than corrective therapeutic techniques. As Reis testified:

These children have been exposed to an early environment that has traumatized them.

And the emotional experience that they suffered obviously is what provoked a maladaptive behavior and was not the adequate, therapeutically speaking.

Therefore the counselors, because the counselors are the focus of transference, they act in a therapeutic manner to correct that past experience.

And transform the maladaptive behavior. . . .

For instance, if a child has been sexually molested and every time you touch them they will assume that you will molest them, you—and you sense that, obviously you will show them with time that not every time you touch them, it has to be sexual.

That there is such a thing as nonsexual touch.

And therefore, you behave different than the father or the mother or whoever inflicted the trauma.

Reis was told by Shabbas in certain instances the group counselors use behavioral techniques,⁶⁵ and, in other instances, they use therapeutically based techniques. She developed a technique which assisted a child in reducing his anxiety and provided him tools to develop self control. Reis testified the group counselors have the time to engage in these therapeutic interventions, like noncredentialed teachers B. I find group counselors are free within certain unexplicated guidelines to choose the intervention technique. As Reis indicated, all IA activity, IA milieu, group counselor, and noncredentialed teachers positions select particular interventions based upon their knowledge of the child, their intervention skills and the history of the child. The group counselors, like their counterparts the IA activity, IA milieu and noncredentialed teacher positions, are not given a list of limited intervention techniques.

Mayeux testified he, like the noncredentialed teachers B, attempts to “process” a child in crisis by taking the child for one-on-one interaction with the group counselor and attempting to induce or cajole the child to relate the reason for their acting out. Therefore, the group counselor attempts to suggest other more socially acceptable methods of respond-

ing to stressful situations, like the noncredentialed teachers B, teaching the child “life skills.”

According to Geller,⁶⁶ the noncredentialed teachers B also engage in “behavioral interaction” during “processing.” Both noncredentialed teachers B and group counselors talk to the children one-on-one in an attempt to calm them and discuss their problems to assist the child in finding an appropriate method of dealing with their problems rather than being disruptive. Both positions impose consequences, such as standing in a corner or doing laps to expend excessive energy. I find both noncredentialed teachers B and group counselors are engaged in assisting the children to learn how to interact with their peers and adults in a variety of settings, a school setting for the noncredentialed teachers B and a residence setting for the group counselors. In the terms used by the witnesses, they are involved in teaching life skills.

As previously noted, Respondent emphasized the statistical and/or charting requirements the noncredentialed teachers must meet. The exhibit containing these charts demonstrate the noncredentialed teachers B use interventions similar to those employed by the group counselors. The chart for each child includes the date and time of the crises, a short statement of the problem, such as poor transition, teasing, disruptive, conflict with peers, etc., and the intervention. The interventions were principally those Respondent described as behavioral, including those frequently resorted to by IA’s milieu the preceding year and group counselors both in the past and currently. These behavioral interventions include writing lines such as I will not spit at classmates, running laps, standing in the corner or quiet time, and containment. The chart indicated the noncredentialed teachers B resort to consequences, which was characterized as a behaviorally based method of handling the children. I conclude the evidence fails to demonstrate the noncredentialed teachers B duties and methods are substantially different from the IA’s milieu or more professional than then the group counselors and/or IA’s milieu.

Geller described the intervention techniques and actions of the noncredentialed teachers B as requiring about 10 percent of time in the classrooms and the other 90 percent of his time in backup. The classroom interventions ranged from sticking his head in the classroom door to let the students know he is around to physically restraining a child in the classroom. While noncredentialed teachers B may devise new intervention techniques, other staff members, including group counselors, engage in analogous refinement of the interventions they employ as they determine the needs of the individual children. That the noncredentialed teachers B work with more children does not indicate a greater degree of professionalism; the contrary could be argued, fewer staff per child may indicate more intensive interaction between the group counselors and children.

⁶⁵ Behavioral techniques described by the witness were also called consequences such as writing sentences such as “I will not yell,” doing laps, standing in a corner for one-half an hour, etc. The consequence is not important conceptually, the goal is to insure the child knows that each time he or she misbehaves, they will receive a consequence. The group counselors select the consequences. Reis was also told by Shabbas when she was hired “that the program was basically based upon a psychoanalytic psychodynamic point of view in which we provide pseudoparental figures, which are the counselors.”

⁶⁶ Geller did not testify in an open and forthright manner, and where his testimony is contradicted or inconsistent, I find it is not credible. For example, he testified he did not want to be the bargaining unit, indicating the Union was limited to representing the employees of the residential units, later he admitted the Union also represents the classroom instructional assistants. Geller also indicated the group counselors are not professional while the noncredentialed teachers B are; but he failed to detail any firsthand knowledge concerning the duties or other attributes of the group counselor’s upon which this claimed difference was based.

There were no statistics or other comparisons drawn on the record between the number of interventions engaged in by IA's milieu compared to noncredentialed teachers B. The addition of the quiet room for the 1990–1991 school year does not warrant the conclusion interventions were different because of a change in duties rather than an addition of facilities.⁶⁷ The record does not establish the noncredentialed teachers B engage in significantly different and more professional interventions than their redecessors, the IA milieu employees, or the group counselors.

Group counselors also have some freedom in changing the children's schedules; they can change the breakfast hour and they also freely develop the activities schedule but they cannot alter the bedtime during school nights. Mayeux changed the breakfast hour. Respondent employs an activities therapist but Mayeux never met with him and he has never participated with Mayeux in developing an activities program. Mayeux credibly testified, without direct refutation, the group counselors can change the program as they need to fit their "personal goals with the children." The presence of two group counselors permits one to "process" a child in crises using their discretion over which intervention technique is employed, while the other attends to the rest of the group. As McKale admitted, both the group counselors and the noncredentialed teachers B lack authority to deviate from the ITP, and the children need consistent interventions and treatment to meet their goals.

As previously noted, every 6 months, each child is the subject of a psychiatric staffing and the group counselor prepares a prestaffing report on their two key children. At times a group counselor may have more than two key children, depending on staff requirements due to such exigencies such as changes in assignments of key children, illness or vacancies. In preparation for writing the report, the units six group counselors meet every Wednesday for 1-1/2 hours to prepare for these reports. While the key counselor writes the report for their key children, all group counselors have input in these reports. Like the rest of Lincoln's employees, the group counselors are part of a team effort.

The noncredentialed teachers B prepare more reports for the ITP meetings for they handle more children in backup than the group counselors who are assigned only two key children. Babcock testified the reports he prepared as a psychiatric counselor were as indepth as those he prepared as a noncredentialed teacher B, but remarked he was not required

to provide the indepth report as a psychiatric counselor. The basis for this opinion was not adduced and I do not credit this testimony based on his demeanor which was not open and honest. Also, the lack of foundation for this opinion further calls into question his reliability. Babcock appeared to be attempting to cast his answers in a light most favorable to his employer's position rather than attempting to present the facts in a candid manner. Geller's indepth records mirror those of Reis, and are found to be consistent with those prepared by group counselors, members of the unit.

The psychiatric staffings are attended by the program director, a social worker, the group counselor of the key child, a teacher C, or perhaps a teacher's aide, and a psychiatrist. The group counselor starts the meeting by giving the prestaffing report which deals with how the child is progressing in meeting their individual treatment goals, whether the child has improved over the last 6 months, have any maladaptive behaviors been extinguished, do the treatment goals need to be changed, is the child frequently "acting out" or having "crisis."⁶⁸ The team tries to improve the ITP⁶⁹ and share their insights, such as the social worker informing the other participants of insights gained from their work with the child and the child's family. The noncredentialed teachers B do not attend the psychiatric staffing.

Once a week the social worker dines with the group counselors and their eight children and they have a group therapy session which, according to their job description, the group counselors are to "co-lead therapy groups relating to milieu goals" as well as "Must demonstrate commitment to professional growth and an increasing in clinical skills." The group counselors play a principal role in the group therapy sessions.

⁶⁸ Specific changes in the child are detailed in the prestaffing report, which is usually two pages long. Specific matters included in the report include relationships with peers such as the quality of the interaction, the child's verbal and social skills, etc.; their relationships with adults such as responses to authority, responses to daily routines, ability to use staff to meet their needs, etc.; recreation, including, areas of interest, strengths and weaknesses, group versus individual play, etc.; community activities, such as types, frequency, place and amount of supervision; self-image including grooming, care of possessions, feelings about self and defenses; and questions and concerns.

⁶⁹ The principal of the school claims to send the noncredentialed teachers to one IEP, which the group counselors do not attend. As previously noted, the IEPs are held during the school day so neither the noncredentialed teachers nor the group counselors are usually available to attend, and there is no requirement they attend. As Silva-Broussard noted, all IA activity were "invited to become involved" in the IEP but his schedule prevented his attendance. Thus, involvement in the IEP is not indicative of change in status. The IA milieu position description required the incumbent "under the supervision of the Assistant Program Director, to implement a crisis backup system consistent with individual children's IEP and treatment goals and agency philosophy" and to "develop group handling techniques consistent with milieu program, individual children's IEP and treatment goals and program policy." The noncredentialed teacher B position description appears to include the same requirements, but the phrase "treatment goals and agency philosophy" were labeled with the limiting term "life skills program." I find this difference, combined with the others, fails to alter the nature and scope of the noncredentialed teacher B position from the IA milieu position.

⁶⁷ Respondent admits the establishment of the IRT program introduced older and more violent children to the school requiring more physical restraints as interventions. The introduction of these students to the school did not increase the independence of the noncredentialed teachers compared to the IA's milieu. As Houser admitted, "And so, the interventions available to be used with them are guided much more strictly by the psychiatrist. And so, those are the kinds of interventions we chose for them." She also indicated Pellegrini and other supervisors are spending much of their time at the new school, which may indicate the noncredentialed teachers B in the IRT program are subject to more supervision than were the IA's milieu. The record does not detail the supervision of the IA's milieu during the 1990–1990 school year, but Pellegrini testified the noncredentialed teachers B are to proceed as part of a team, consulting the team prior to implementing any innovation. Thus, I find Respondent failed to establish its claim noncredentialed teachers B have much greater independence than IA's Milieu and group counselors.

Conclusions

I conclude Respondent has failed to meet its burden of proving the noncredentialed teachers are “sufficiently dissimilar” from the IA activity, IA milieu, and group counselor positions to warrant their removal from the unit. *Rice Food Markets*, supra, 255 NLRB 884, 886–887 (1981).

The duties of the noncredentialed teachers are not shown to be comparable to the teachers C and/or social workers and psychiatrists or licensed psychologists or any other asserted professional employed by Respondent or otherwise. There is no stipulation or other binding conclusion that any of Respondent’s employees are professionals as defined by the Act. Not one social worker or psychotherapist testified about their job duties, thereby making it impossible to draw any analogies. Similarly, there was no testimony from a teacher C describing their job duties. *Western Electric Co.*, 126 NLRB 1346 (1960). The lack of evidence concerning the activities of employees not included in the unit whom Respondent claims are professionals, compared to the qualifications and duties of the noncredentialed teachers, does not permit the conclusion noncredentialed teachers possess any therapeutic independence or otherwise operate analogously to the teachers C, social workers and/or psychotherapists. I conclude Respondent has failed to meet its burden of proving the IA’s activity and milieu and group counselors were not professionals while the noncredentialed teachers are professionals.

I also find the noncredentialed teacher positions were substitutions for the IA activity and milieu positions. Most, if not all, of the incumbent IA’s activity and milieu at the conclusion of the 1989–1990 school year were hired as noncredentialed teachers and performed substantially the same work. Respondent’s counsel, by letter dated July 31, 1990, informed the Union the IA activity and milieu positions had been eliminated and in their stead the school would employ noncredentialed teachers. By letter dated September 6, 1990, Respondent claimed they made substantial changes to the IA activity and milieu positions, including “to professionalize the positions.” However, I find the substitution or replacement closer to Respondent’s past practices of making changes in terminology rather than substantively altering job duties, to accomplish its goal of removing the IA activity and IA milieu positions and their work from the unit. Respondent argues the group counselors are glorified babysitters, but the job description as well as the testimony of the group counselors demonstrates they clinically or therapeutically implement the IEPs and ITPs and participate in the revision of the ITP. McKale admitted Respondent would not accept either the noncredentialed teachers B or the group counselors deviating from the individual students ITPs.

McKale testified the duties of the group counselors was:

to receive the children into program and to supervise them and care for them according to a treatment plan, to make sure that what they’re doing for the children is carrying out the treatment plan, is protecting the children, and setting up a kind of home-like environment for the children to feel secure and protected.

Respondent’s educational and training requirements for group counselors, their supervision by and close working relationships with the social workers, whom Respondent asserts

are professionals, the requirement they develop clinical skills, their freedom to exercise discretion in the performance of their job duties, including intervening with children in crises and preparing reports which could lead to modification of the ITPs, amply refutes any contention the group counselors are glorified babysitters. I find group counselors are at least as involved in the observation, reporting and recording of the students’ physical and emotional behavior and as involved in the development of therapeutic “interpersonal relationships with the [children] by engaging the [child] in therapeutic” discussions and/or activities as the noncredentialed teachers, if not more so. *Community Health Services*, 259 NLRB 362 (1981).

As was the case in *Community Health Services*, supra, and *Butler Hospital*, 250 NLRB 1310 (1980), Respondent does not require the noncredentialed teachers or the Group counselors to have licenses or certificates. group counselors, who are admittedly appropriately included in the unit and whom Respondent considers to be nonprofessionals, are primarily constrained to assist the claimed professional staff by obtaining information from the children. There is no evidence the noncredentialed teachers engage in psychotherapy or other forms of treatment usually rendered by the asserted professional staff of licensed social workers and psychiatrists. *New England Telephone Co.*, 179 NLRB 527 (1969). I conclude the character of the work required of the IA’s activity, IA’s milieu, and their successors the noncredentialed teachers, is principally the same.

In contrast to Reis and the other group counselors seeking masters degrees and/or licenses as psychological counselors or therapists, none of the noncredentialed teachers are seeking advanced degrees or certification as teachers or licenses as therapists or social workers. There is no evidence any noncredentialed teacher belonged to a teaching or other professionally oriented society or club. *Lakeshore Manor*, 225 NLRB 908 (1976). Compare *Chicago School for the Retarded*, 225 NLRB 1207 (1976).

None of these positions are required by state law to attend IEP meetings, which could be an indication of professional status. The noncredentialed teachers do not independently evaluate the students or make independent determinations of appropriate therapy goals, or decide which skills are to be developed. They follow the IEPs and ITPs as well as the programs and directions of the social workers, teachers C, and psychotherapists. The record fails to demonstrate they perform the intellectual and varied work requiring consistent exercise of discretion and subjective judgement within the meaning of Section 2(12) of the Act. The *Mason Clinic*, 221 NLRB 374, 377 (1975); *Kaiser Foundation Hospitals*, supra, 228 NLRB 468, 481 (1977).

In sum, I find the noncredentialed teachers to be technical employees rather than professionals. Respondent’s granting of wage increases to the noncredentialed teachers does not weigh in this decision, else such bootstrapping would permit employers to selectively destroy units employing technical employees by merely unilaterally changing their job titles, altering their position descriptions to relate their duties in greater detail,⁷⁰ and unilaterally granting them wage in-

⁷⁰ As previously found, some of the described duties of the noncredentialed teachers were not implemented, the noncredentialed teachers are not required to perform them. I therefore conclude, any

creases. Assuming the varied work occasioned by the frequent need to intervene when children are in crises is considered the performance of intellectual and varied duties requiring the consistent exercise of or discretion and subjective judgement, then it would be found the unit has traditionally been a mix of professionals and nonprofessionals, for the group counselors and IA's activity and IA's milieu duties are so similar to those of the noncredentialed teachers B to require this conclusion. The noncredentialed teachers B work in the milieu of the school and the group counselors in the milieu of the residence. This difference is insufficient to warrant finding one group are professionals and the other nonprofessionals. *Kaiser Foundation Hospitals*, 228 NLRB 469 (1977). I conclude Respondent's claim it was justified in unilaterally, without prior notice to the Union and without affording the Union an opportunity to bargain concerning this decision to remove the noncredentialed teachers from the unit because they are professionals to be without merit.

If the noncredentialed teachers were found to be professionals, then I would also find the IA activity and milieu as well as the group counselor positions to also be professional as defined in the Act. As General Counsel notes, Respondent's voluntary recognition of a mixed unit bars the unilateral removal of the professional employees from the unit. *Corporacion de Servicios Legales*, 289 NLRB 612 (1988). I find inclusion of the noncredentialed teachers in the unit is still appropriate. *Rice Food Markets*, *Supra*.

Respondent's unilateral removal of classifications from the unit is a violation of Section 8(a)(5) and (1) of the Act, and there was no agreement by the Union the IA activity and milieu positions could be transformed into nonunit jobs. *United Technologies Corp.*, 292 NLRB 248, 249 (1989), citing *Bozzuto's, Inc.*, 277 NLRB 977 (1985), and *Frankline, Inc.*, 287 NLRB 263, 264 fn. 8 (1987). The basis for these holdings was clearly explicated in *Arizona Electric Power*, 250 NLRB 1132, 1133 (1980) as follows:

It is axiomatic that parties to a collective-bargaining relationship cannot bargain meaningfully unless they know the scope of the unit for which they are to bargain.² Thus, it is well established that the integrity of a bargaining unit cannot be unilaterally attacked,³ and that once a unit is certified, it may be changed only by mutual agreement or by Board action.⁴

²*Douds v. International Longshoremen's Association, Independent*, 241 F.2d 278, 282 (2d Cir. 1957).

³*International Union of Operating Engineers, Local 428, et al. (Phelps Dodge Corporation)*, 184 NLRB 976, 977 (1970); *Delhi-Taylor Refining Division, Hess Oil and Chemical Corporation*, 167 NLRB 115, 116, fn. 4 (1967).

⁴*Hunt Brothers Construction, Inc.*, 219 NLRB 177 (1975).

General Counsel correctly argues Respondent was not privileged to unilaterally remove the noncredentialed teachers from the unit even if these were found to be professional assignments because the unit has suffered a significant loss of work by what essentially is a loss of all IA activity and IA milieu jobs. Citing *Lutheran Home of Kendalville*, 264 NLRB 525 (1982). Cf. *Central Cartage*, 236 NLRB 1232,

expression in the position descriptions indicating the noncredentialed teachers have significantly greater duties of a more professional character cannot be relied on as other than hyperbole.

1258 (1978); *Kendall College*, 228 NLRB 1083, 1088 (1977); *Tesoro Petroleum Corp.*, 192 NLRB 354, 359 (1971). "Respondent was not at liberty to change the functions of jobs without consulting the Union." *Everbrite Electric Signs*, 222 NLRB 679 (1976). See also *Lange Co.*, 222 NLRB 558 (1976). The need to bargain about the change is exacerbated here where the former unit employees were "hired" as noncredentialed teachers and continued to perform bargaining unit work. *Laclede Gas Co.*, 171 NLRB 1392 (1968).

D. The Alleged Unlawful Unilateral Wage Increase

Having found the noncredentialed teachers are appropriate members of the unit, the undisputed unilateral wage increases given these employees without notice to or bargaining with the union violates Section 8(a)(5) and (1) of the Act. Wage increases are a mandatory subject of bargaining. Assuming the noncredentialed teachers are professionals, pursuant to the *Leclde*, *supra*, line of cases, Respondent still has an obligation to inform and afford the Union an opportunity to bargain. See *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964); *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965).

E. Respondent's Affirmative Defenses

Respondent argues the Union contractually waived its statutory right to bargain over the removal of the IA activity and milieu positions from the unit. Citing *Ador Corp.*, 150 NLRB 1658 (1965), and *Norris Industries*, 231 NLRB 50 (1977). Respondent also claims the Union waived its right to bargain over the unilateral change in employee classifications by its inaction and failure to bargain during previous reclassifications.

General Counsel rejoins the Union is privileged to refuse to bargain about a nonmandatory subject of bargaining such as removal of positions from the bargaining unit during the term of the collective-bargaining agreement. General Counsel notes the only exception to this assessment is when the alteration in job duties meet the criteria recited in *NLRB v. Bay Shipbuilding Corp.*, *supra*, 721 F.2d 187 (7th Cir. 1983). I have concluded above the changes in the positions are not so significant and inclusion of the noncredentialed teachers in the bargaining unit is still appropriate.

As the Board held in *TCI of New York*, 301 NLRB 822 (1991):

The right to be consulted on changes in terms and conditions of employment is a statutory right; thus, to establish that it has been waived the party asserting waiver must show that the right has been clearly and unmistakably relinquished. Whether such showing has been made is decided by "an examination of all the surrounding circumstances including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement," *Columbus Electric Co.*, 270 NLRB 686 (1984), citing *Bancroft-Whitney Co.*, 214 NLRB 57 (1974).

Section 5 of the collective-bargaining agreement, which is in effect through June 30, 1992, entitled "Exclusive Right to Manage," provides, as here pertinent:

5.01 The employer has the exclusive right to manage its business, including those rights and prerogatives exercised unilaterally, in the same manner and to the same degree and scope as existed immediately prior to the date the Union was certified by the National Labor Relations Board, except as those rights and prerogatives are expressly abridged, delegated, granted or modified by this agreement.

5.02 The Employer has the exclusive right to manage its affairs, to direct and control its operations and independently to make, carry out and execute all plans and decisions deemed necessary in its judgement for its welfare, advancement or best interests. Such management prerogatives shall be exercised unilaterally and shall include, but not be limited to the following rights:

- (a) To engage in business generally.
- (b) To decide the number and location of facilities.
- (c) To decide the facilities and equipment to be used.
- (d) To decide the services to be performed, including the expansion and contraction of services generally, or any activity or function specifically.
- (e) To move or remove the facilities or any of its parts to other areas.
- (f) To determine or modify the size of the programs.
- (g) To decide the method, philosophy and place of service.
- (h) To determine the schedules of services including expansion and contraction. . . .
- (j) To hire, lay off, assign, transfer, promote and demote Employees or discontinue positions. Promotions are based on evaluations of past performance and capability, competence, education and experience for the vacant position.
- (k) To determine the qualifications of Employees.
- (l) To determine and redetermine job content.
- (m) To create or abolish jobs and job functions. . . .
- (r) To schedule employees for work.
- (s) To make such rules and regulations not in conflict with this Agreement, as it may from time to time deem best for the purposes of maintaining order, safety and/or effective operation of the facilities, and after advance notice thereof to the Union and the Employees to require compliance therewith by Employees. . . .
- (v) To contract or subcontract for performance of any of its services.

I find Respondent's claim the Union waived its right to bargain about whether entire classifications of employees can unilaterally be removed from the unit by the Employer. Both the Board and Seventh Circuit expressly rejected a similar argument in the *Bay Shipbuilding* case, *supra*. The Board held at 263 NLRB 1133,

In reality Respondent is attempting to justify removing a group of employees and their work from the collective-bargaining relationship. I conclude that Respondent does not have the right to simply designate that group henceforth as nonunion, but rather Respondent has the burden of showing that the group is sufficiently dis-

similar from the remainder of the union so as to warrant its removal.

I have found above the noncredentialed teachers are not sufficiently dissimilar from the IA activity, IA milieu, and group counselor positions to warrant their removal from the unit. Assuming such a finding, the record still requires the conclusion Respondent failed to bear the burden of proving this affirmative defense for it failed to show waiver of this subject from Respondent's usual bargaining obligation. The record fails to demonstrate there was a "clear and unmistakable"⁷¹ waiver of the obligation to bargain about the removal of entire classifications from the unit. The specific items mentioned in the management-rights clause do not clearly and unmistakably mention and thereby waive this bargaining right. *New York Mirror*, 151 NLRB 834 (1965). The right to transfer one employee does not grant the right to transfer two entire classifications of employees. *C&C Plywood Corp.*, 148 NLRB 414 (1964), *enf. denied* 351 F.2d 224 (9th Cir. 1965), *revd. and remanded* 385 U.S. 421 (1967).

I further find the bargaining history does not reveal the Union knowledgeably relinquished this right. In fact the collective-bargaining agreement appears to contemplate the inclusion of "teachers" in the unit by containing a classification denominated "group counselor/teacher." To date, this classification has not been used.

Waiver will not be presumed unless there is "clear and unequivocal evidence pointing to a 'conscious relinquishment.'" *Henry Vogt Machine Co.*, 251 NLRB 363 (1980). Hoyt, Respondent's negotiator before 1982 and chief negotiator since 1982, testified she told the union negotiator, who did not testify:

under no uncertain terms would Lincoln Child Center ever have job descriptions as a negotiable item, or that we would ever negotiate anything to do with program. If it touched the children—and those are the words I used—if it touched the children, we would never negotiate it, period.

Hoyt explained to the union negotiating committee:

I had been instructed quite clearly by the Board of Directors and by the Executive Director of Lincoln Child Center at that time, Vi Finehour, that whatever I did, however the contract turned out, that I had to have the ability to make changes in program as sacrosanct as possible. Because with the type of children you're dealing with, you never know what's going to occur, and they wanted the flexibility to change the program.

Hoyt does not recall any response to her statement. According to Hoyt, her comments "basically ended the discussion on management's rights." Her comments about program content did not clearly and unmistakably indicate management intended to possess the right to remove entire classifications and their work from the unit. Hoyt's testimony fails to prove the Union knowingly relinquished its right to bargain about the matter. *N. L. Industries*, 220 NLRB 41, 43 (1975); *Perkins Machine Co.*, 141 NLRB 98, 102 (1963).

⁷¹ *Norris Industries*, *supra*.

For example Hoyt testified she did not recall if subsection (i) of section 5.02 of the collective-bargaining agreement was discussed during negotiations. Hoyt's comments do not demonstrate clear and unequivocal notice Respondent intended to create a right to unilaterally alter the unit by removing unit members and unit work. The record fails to demonstrate union acquiescence to unilateral repose of this right in Respondent. Further, I find Hoyt's testimony was unclear at times concerning what was said rather than why Respondent wanted a particular clause. This lack of clarity and her failure to recall what was said by either herself or the union representative concerning key provisions, also precludes a finding the Union was given clear and unequivocal notice of Respondent's intent to unilaterally remove classifications and work from the unit, no less knowingly relinquished this right.

Respondent also unsuccessfully attempted to establish Union waiver by inaction and past practice. The past practice argument is inapplicable. The collective-bargaining agreement provides:

17.01 This Agreement is subject to amendment, alteration or addition only by a subsequent written agreement between, and executed by, the Employer and the Union. The waiver of any breach, term or condition of this Agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.

I conclude the Union did not explicitly waive in the collective-bargaining agreement or any subsequent agreement its right to bargain about removal of classifications and work from the unit. Respondent has failed to meet the criteria established in *Register-Guard*, 301 NLRB 494 (1991), that the evidence is "sufficient to demonstrate that the allegedly waived matter was fully explored in negotiations and that the statutory right at issue was consciously yielded."

Further, Respondent has failed to establish there was a past practice of removing entire classifications from the unit. Respondent has unilaterally transferred or promoted individuals, but never an entire classification. Also, as noted in *Owens-Corning Fiberglass*, 282 NLRB 609 (1987), and cases cited therein, "A Union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time."

The Union in this case sought information concerning the change Respondent stated it implemented. There was never an opportunity to negotiate the matter which was presented as a fait accompli. The Union filed a grievance concerning the changes after they were implemented, which I find was within a reasonable period of time after it determined the nature and scope of Respondent's unilateral changes. The Union's representative Deems, was not notified in writing, pursuant to the parties' admitted agreement, until July 31, 1990. Deems did not receive two of the job descriptions until on or about August 15, 1990. By September 4, 1990, the Union informed Respondent the changes were considered to be "changes in current bargaining position" and had requested on August 2, 1990, "a meeting to discuss the matter."

As detailed above, scheduling problems resulted in holding the first meeting to discuss the changes on a date subsequent to Respondent's implementation of the changes. When the

Union recognized the nature and scope of the unilateral changes, it filed a charge with the Board, which serves in lieu of a demand to bargain as a means of resolving their differences concerning interpretation of the collective-bargaining agreement. *Kohler Co.*, supra.

Accordingly, I conclude the Union has not waived its right to bargain with Respondent over removal of classifications and work from the unit and wage increases, required subjects of bargaining, and Respondent's unilateral actions without providing the Union prior notice and an opportunity to bargain violated Section 8(a)(5) and (1) of the Act.

F. The Alleged Violations of Section 8(a)(1) the September 19 Meeting

The complaint asserts Respondent, during the September 19 meeting:

(a) Acting through McKale and its designated representative, informed the employees in the New Positions that they were no longer in the Union because they were professional employees;

(b) Acting through Wilson:

(i) Solicited the employees in the New Positions to cease paying Union dues and, instead, to donate the money to charity;

(ii) Impliedly promised that the employees in the New Positions who ceased paying Union dues would be promoted to supervisory positions; and

(iii) Solicited employees in the New Positions to revoke their dues checkoff authorizations.

The parties stipulated that prior to September 19, 1990, Respondent withheld union dues from the paychecks of Ralph Silva-Broussard, Orlando Harrell, Margo Stills, Vincent Goldman, and Joe Ferrie, and by October 1, 1990, these employees had requested Respondent to discontinue withholding union dues from their paychecks. There is no evidence Respondent ever withheld union dues from the paychecks of the new employees it hired as noncredentialed teachers.

Deems testified convincingly that prior to September 13, 1990, during a telephone conversation, McKale informed her Respondent had already ceased deduction of union dues from the pay of those employees who had been IA's activity and milieu and were now noncredentialed teachers. Deems informed McKale the Union still represented these employees and considered Respondent's action improper.

McKale sent a notice⁷² to 13 named noncredentialed teachers on September 17, concerning the September 13

⁷² The notice provided:

A meeting was held with the union business representative last Thursday afternoon about the new positions being occupied by you.

At that meeting it became clear to me that you should hear what changes will affect you as staff at Lincoln.

It is Lincoln's belief that all teaching positions are professional positions, and therefore are nonunion positions. This includes credentialed and noncredentialed teachers.

I have scheduled a meeting on Wednesday afternoon at 3:30 . . . to discuss future directions and options for you, and possible issues if the union takes a stance different from what Lincoln's believes [sic].

meeting between the Union and Respondent and inviting them to a meeting to be held September 19, to discuss the Respondent's position the noncredentialed teachers are professionals and nonunion positions. Mayeux was also invited to attend this meeting. General Counsel alleges during this meeting Respondent violated Section 8(a)(1) of the Act by informing employees they are no longer in the unit and by soliciting unit employees to revoke their dues-checkoff authorizations. Respondent admittedly reiterated its position the noncredentialed teachers were no longer in the unit during the meeting.

The meeting was attended by noncredentialed teachers, Mayeux and the following admitted supervisors; Mary Ann McKale, the director of Lincoln Child Center; Marcia Hoyt, Respondent's attorney; Jackie Houser, director of the school; Cheryl Wilson, Respondent's assistant director of operations for the school; and the noncredentialed teachers supervisors, Jones and Pellegrini. According to Mayeux, McKale:

opened the meeting by stating that Lincoln Child Center believed that these noncredentialed teachers A and B were no longer in the Union.

However, she did state that she felt that the Union felt otherwise, and she went on to say that they hardly were professionals. I don't remember everything about that, but that was the meat of her presentation.

Cheryl Wilson corroborated Mayeux's testimony which was unrefuted. According to Wilson, McKale said:

That the staff were considered by Lincoln to be noncredentialed A and B teachers, that the positions were considered by the Union to be the positions that they had always been, the—what were they—the IA milieu or whatever they were then, and that that was being contested by the Union and that there were going to be meetings, that people were, you know, to expect that this was going to go on for a little while.

An apology, I think, was said about having everyone in this situation, and that there were certain things that she had to do, that she had to make sure that the Union—that their union dues were set aside while this was happening.

Q. Did [McKale] she say anything to the effect that the Employer considered the noncredentialed teachers A and B to be outside of the bargaining unit and not members of the Union?

A. She said that she considered that the agency considered the A and B positions to be a part of the non-bargaining unit. Okay.

As previously noted, according to Silva-Broussard's credited testimony, McKale also informed the noncredentialed teachers she considered the IA activity and IA milieu positions to already be professional and altered the job descriptions to "fit the jobs that we . . . were already doing."

McKale asked Wilson to attend the meeting as the representative of the staff personnel committee which represents all the nonbargaining unit employees of Respondent. Wilson was to inform the noncredentialed teachers about the staff personnel committee. During the meeting the subject of union dues was raised more than once and there are several

versions of what Wilson said. Silva-Broussard recalled Wilson explaining various options concerning dues and saying "What I did with my union dues when I was in the union was I gave it to a non-profit organization." Mayeux recalled Wilson saying "I will tell you how I handled it." And she went on to state that she gave her union dues to charity, "stayed out of Union business, because of this she was promoted and this was how it worked for her." Wilson recalled McKale saying

that dues needed to be taken out, people needed to decide what they wanted to do with that, you know, and then it came back again and someone said, "Well, what are our options?"

And then I was one of the people who said you have the option of having, you know, paying your union dues or contributing to a charity.

Wilson also recalled McKale apologizing to the noncredentialed teachers for the confusion occasioned by Respondent's position they were professionals not included in the unit while the Union believed they were in the unit and "that their union dues were set aside while this was happening." Wilson specifically denied saying she was promoted because she stayed out of union business. McKale admitted Cheryl Wilson actually saying that "I know you guys are going through a hard time. This is a tough time for you" and "she had a—she had herself paid dues to a charity in her own experience when she was in a union." McKale noted her own reaction to Wilson's union statements as "surprised and taken aback when she spoke of her own personal experiences as a union member and coming out of the union." Neither McKale nor any other representative of Respondent disavowed Wilson's statements.

The parties stipulated that prior to September 19, 1990, Ralph Silva-Broussard, Orlando Harrell, Margo Stills, Vincent Goldman, and Joe Ferrie had authorized Respondent to withhold union dues from their paychecks. At the end of the January 19 meeting, Respondent distributed to all the noncredentialed teachers present a form which mentions the Union's grievance concerning their status as part of the unit and gave them the option to request Respondent to either withhold or not withhold union dues from their paychecks "until there is an official resolution" of the union grievance. On September 28, 1990, McKale informed Mayeux that all employees occupying noncredentialed teacher positions have requested Lincoln to discontinue withholding union dues from their paychecks.

Conclusions

I find Respondent's argument General Counsel failed to produce any evidence in support of the allegation McKale informed the noncredentialed teachers they were not in the union "in an apparent attempt to persuade those employees of the futility in supporting the union," to be without merit. The meeting was called by the top executive of Lincoln and was attended by the noncredentialed teachers' immediate supervisors as well as many of Respondent's top management and attorney. The meeting was preceded by McKale's September 17 letter to the noncredentialed teachers inviting them to the meeting to discuss how the changes to the IA activity and IA milieu positions to noncredentialed teacher positions,

which Respondent designated professional positions and “non-union positions,” would “affect you as staff at Lincoln.”

The agenda McKale distributed to the noncredentialed teachers at the meeting included an explanation of Respondent’s position concerning the noncredentialed teachers positions, a discussion of the legal issues and an introduction to the staff personnel committee. Respondent admits the Union’s grievance was discussed, including the potential adverse impact upon the noncredentialed teachers’ wages and benefits if the Union prevailed in this grievance. After McKale’s, Hoyt’s, and Wilson’s statements and comments, the noncredentialed teachers were given forms prepared by Respondent on its letterhead facilitating their requesting Respondent not to withhold union dues.

The form also permitted the employee to indicate they wish Respondent to withhold union dues from their paychecks; and included the statement if Respondent prevails in their view the employee making this election would be individually responsible to obtain reimbursement from the Union. The record does not indicate this portion of the form was discussed by any of Respondent’s representatives. Respondent never explicated why forms were distributed at the end of the meeting.

There is no testimony any employee asked Respondent to prepare the form or assist them in terminating the deduction of dues from their paychecks.

In fact, if Respondent was correct in their claim the noncredentialed teacher positions were not part of the unit, it had no obligation to institute dues checkoff for the noncredentialed teachers and therefore had no need for the noncredentialed teachers to execute the forms it prepared and distributed. Respondent did not give the assembled noncredentialed teachers any assurances their failure to support the Respondent’s strongly proclaimed position they were professional by completing the forms to request cessation of dues checkoff, would not result in any adverse action. Many of the noncredentialed teachers attending the meeting were very new hires and there was no evidence any noncredentialed teacher solicited information concerning dues checkoff. These statements and actions by Respondent following closely behind its unilateral action, found unlawful herein, and considering all the circumstances, was coercive and constitutes interference with the organizational rights contained in Section 7 of the Act and violates Section 8(a)(1) of the Act.

Concerning the three alleged violations of the Act deriving from Wilson’s comments to the noncredentialed teachers, I find Silva-Broussard’s version of her comments the most reliable based on his forthright and candid demeanor. Further, his version was corroborated by Wilson and McKale. Mayeux’s testimony adding Wilson claimed her donating dues to charity led to her promotion, is not credited because it is contextually improbable that Wilson would volunteer this belief in response to a question that was not shown to require such a gratuitous opinion. I conclude General Counsel has not met its burden of proving Respondent violated Section 8(a)(1) of the Act by the comments by Wilson to the noncredentialed teachers. Her comments concerning her past practice of donating her dues to charity has not been shown to be coercive or to otherwise interfere with the employees’

Section 7 rights. Accordingly, I recommend these allegations be dismissed.

CONCLUSIONS OF LAW

1. Respondent, Lincoln Child Center, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Social Services Union, Local No. 535, Service Employees International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the Union has been the exclusive collective-bargaining representative within the meaning of Section 9(b) of the Act for the following appropriate unit:

All full-time and regular part time group counselors (including all categories of counselor covered in the previous Agreement), tutors, instructional aides, secretaries, maintenance persons, maintenance assistants, janitors, yardpersons, cooks, assistant cooks, housekeepers, excluding all employees in the tutoring workshop program, all other employees, guards, and supervisors as defined in the Act.

4. At all times material, the Union has been the exclusive collective-bargaining representative of all of the employees in the unit found appropriate in Conclusion of Law 3 for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By coercively informing the noncredentialed teachers they were no longer in the Union because they were professional employees while soliciting these employees to terminate automatic dues deductions, Respondent violated Section 8(a)(1) of the Act.

6. On or about August 31, 1990, by unilaterally, without prior notice to and the consent of the Union and without affording the Union an opportunity to negotiate and bargain about the changes of removing unit work, removing the positions of noncredentialed teachers A and B from the bargaining unit after substituting these new positions for the IA activity and IA milieu positions; and unilaterally granting the noncredentialed teachers A and B wage increases, Respondent has engaged in an unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

7. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Respondent did not engage in unfair labor practices alleged in the complaint not specifically found herein.

THE REMEDY

Having found that Respondent Employer has engaged in unfair labor practices proscribed by Section 8(a)(1) and (5) and Section 8(d) of the Act, I recommend that it cease and desist therefrom, and that it take certain affirmative action designed to remedy the unfair labor practices and to effectuate the policies of the Act.

I further find that, as part of the appropriate remedy, Respondent be ordered to bargain, upon request, with the Union as the exclusive representative of the unit employees. See *Winn-Dixie Stores*, 243 NLRB 972 (1979); *Alsey Refractories Co.*, 215 NLRB 785 (1974). Specifically, I recommend Respondent be ordered to bargain with the Union over its proposals to replace the IA activity and IA milieu positions

with noncredentialed teachers A and B and remove these positions from the unit and to bargain with the Union over the wages to be paid noncredentialed teachers. Respondent shall be ordered not only to recognize the Union as the representative of the noncredentialed teachers A and B as part of the overall unit, but also to make whole those employees for any losses they may have suffered as a result of Respondent's failure to apply the applicable collective-bargaining agreement by payment to them of any wage differentials, as described below, and by making all pension, health and welfare payments, and any other contributions required by the collective-bargaining agreement.

Respondent shall also be ordered to make the employees whole by requiring it to pay all delinquent contributions owing under the collective-bargaining agreement to the Union's Welfare Fund and/or other benefit funds,⁷³ and to reimburse the affected employees, with interest, for any expenses they may have incurred as a result of the Respondent's failure to make any requisite benefit fund contributions, in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980).

Further, it is recommended Respondent, on the Union's request, be ordered to cancel any wage increases unlawfully implemented by Respondent's unilateral action. Nothing in the order should be construed as requiring Respondent to cancel any wage increase without a request from the Union. See *Taft Broadcasting Co.*, 264 NLRB 185 fn. 6 (1982). Any backpay is to be computed as provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*.⁷⁴

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷⁵

ORDER

The Respondent, West Oakland Home, Inc. d/b/a Lincoln Child Center, Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively informing the noncredentialed teachers they were no longer in the Union because they were professional employees, while soliciting these employees to terminate automatic dues deductions, in violation of Section 8(a)(1) of the Act.

(b) Withdrawing recognition from, or refusing to bargain collectively with as the exclusive representative of all in the employees in a unit appropriate for the purposes of collective

bargaining within the meaning of Section 9(b) of the act, composed of:

All full-time and regular part time group counselors (including all categories of counselor covered in the previous Agreement), tutors, instructional aides, secretaries, maintenance persons, maintenance assistants, janitors, yardpersons, cooks, assistant cooks, housekeepers, excluding all employees in the tutoring workshop program, all other employees, guards, and supervisors as defined in the Act.

(c) Changing unilaterally terms and conditions of employment without first affording the Social Services Union, Local No. 535, Service Employees International Union, AFL-CIO, the opportunity to bargain over the proposed changes, by unilaterally removing unit work, removing the positions of noncredentialed teachers A and B from the bargaining unit after substituting these new positions for the IA activity and IA milieu positions; and unilaterally granting the noncredentialed teachers A and B wage increases.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain with the Union as the exclusive representative of the employees in the unit described above.

(b) On request, bargain with Social Services Union, Local No. 535, Service Employees International Union, AFL-CIO, over removal of work from the Union, removal of the noncredentialed teacher A and B positions from the unit and substituting these positions for the IA activity and IA milieu positions, and the wage increases given noncredentialed teachers A and B.

(c) If the Union requests, cancel any wage increases and any of the other above described unilateral changes wrongfully implemented by Respondent.

(d) Make the employees in the unit described above whole for any losses they may have suffered as a consequence of the Respondent's unlawful unilateral changes to their terms and conditions of employment and, as the noncredentialed teachers A and B exclusive collective-bargaining representative in the manner specified in the remedy section of the decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility and place of business in Oakland, California, copies of the attached notice marked "Appendix." ⁷⁶Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places

⁷³ Any additional amounts to such payments shall be computed in accordance with the Board's decision in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

⁷⁴ In accordance with the Board's decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

⁷⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁷⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be, and it is hereby dismissed insofar as it alleges violations of the Act not specifically found.